IN THE SUPREME COURT OF THE UNITED STATES

DONALD ABNEY
LARRY STARKS
and ALONZO ROBINSON,
Petitioners

V.

UNITED STATES OF AMERICA,
Respondent

TERM

NO. 75-6521

JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THOMAS C. CARROLL, ESQUIRE
MARK D. SCHAFFER, ESQUIRE
Attorneys for Alonzo Robinson
Defender Association of Philadelphia
Federal Court Division
Room 904, 21 South 12th Street
Philadelphia, Pennsylvania 19107

RALPH DAVID SAMUEL, ESQUIRE
Attorney for Larry Starks
2010 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

JOEL H. SLOMSKY, ESQUIRE
Attorney for Donald Abney
2616 Two Girard Plaza
Philadelphia, Pennsylvania 19102

TABLE OF CONTENTS

TABLE OF CITATIONS

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 5, 1976. A joint Petition on behalf of all Petitioners is filed under the authority of Rule 46 of the Rules of this Court.

OPINIONS BELOW

The oral opinion and order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, J.) in Criminal Number 74-133 is attached as Appendix "A" hereto. The Judgment Order of the United States Court of Appeals for the Third Circuit under Numbers 75-2071, 2072 and 2073 affirming the order of the District Court is attached as Appendix "B(1)" and denial of Petition For Rehearing as "B(2)". An earlier opinion of the Court of Appeals reversing judgment of conviction after direct appeal is reported at 515 F.2d 112 (3d Cir. 1975).

JURISDICTION

The judgment order of the Court of Appeals affirming the District Court was entered on February 10, 1976. A timely Petition For Rehearing was denied on March 5, 1976. On March 16, 1976, the Court of Appeals stayed the issuance of the mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate

Procedure, to April 4, 1976 pending the filing of the present Petition For Writ Of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and under the doctrine of United States v. DiSilvio, 520 F.2d 247 (3d Cir. 1975).

THE QUESTIONS PRESENTED

1. Whether retrial of Petitioners is barred by the double clause of the Fifth Amendment where a general verdict of guilty on a duplicitous indictment fails to disclose whether the jury found each defendant guilty of one crime or both.

2. Whether the indictment fails to charge an offense.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULE OF CRIMINAL PROCEDURE
7(c)(1)

(c) Nature And Contents.

> (1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

STATEMENT OF THE CASE

On March 14, 1974, defendant-petitioners herein were first charged in a duplicitous one count indictment with conspiracy and attempt to violate the Hobbs Act, 18 U.S.C. § 1951; they were found guilty in a general verdict, and took a direct appeal. Judgment of conviction was reversed and the

case remanded to the district court: United States v. Starks et al, 515 F.2d 112, 115 (C.A. 3, 1975). In its opinion, this Court of Appeals found that the indictment was duplicitous. 515 F.2d at 116.

The Court of Appeals ordered the government to make an election to proceed on retrial on one or the other of the two crimes charged in the single count indictment. The government, in a pre-trial conference on August 22, 1975, expressed its intention to proceed on a conspiracy allegation of the indictment.

Defendant-petitioners each filed a Motion To Dismiss on the basis that a second trial on this indictment, even following the government's election, will subject them to double jeopardy in violation of their rights under the Fifth Amendment to the United States Constitution. In their motions, defendant-petitioners also argued that following the government's election to proceed on the conspiracy allegation, the indictment in this case is fatally defective for failure to sufficiently charge a crime under the laws of the United States.

On September 2, 1975, the District Court denied each of the defendant-petitioners' motions; this order was in turn affirmed by the Court of Appeals. Review is sought herein of this affirmance by the Court of Appeals. All proceedings concerning the retrial of petitioners in the district court have been stayed pending the filing and disposition of this Petition For Certiorari.

REASONS FOR GRANTING THE WRIT

1. Double Jeopardy Claim

The "singularly inartistic indictment" (515 F.2d 112, 116) in this case charges two offenses -- conspiracy and attempt -- in one count. (The indictment is set forth in full at Appendix "C").

The problems with a duplicitous indictment are set forth in the opinion of this Court in United States v. Starks et al, supra, at page 116:

> "One vice of duplicity is that a general verdict for a defendant on that count does not reveal whether the jury found him not guilty of one crime or not guilty of both. Conceivably this could prejudice a defendant in protecting himself against double jeopardy. Another vice of duplicity is that a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both. Conceivably, this could prejudice a defendant in sentencing and obtaining appellate review . . ." (Emphasis added). 515 F.2d 112 at 116

Professor Moore has additionally noted that the essential problem with a duplicitous indictment is the confusion it breeds in the minds of the jurors. Moore's Federal Practice, §8.03, fn. 5.

In the lower court, the Government persistently refused to elect between the charges. In his charge to the jury, the learned trial judge failed to explicitly charge that to convict any defendant of the dual charges laid in this indictment that such defendant must be found guilty by the jury of all the essential elements of both offenses. During objections

to the charge, Mr. Carroll, counsel for defendant Robinson, suggested to the Court that it had not clearly charged the jury that before any defendant could be found guilty, the jury must find:

> " . . . number 1, was there a conspiracy, number 2, was this defendant a member of that conspiracy, and, number 3, did he commit an act constituting attempt." Tr. page 10-54.
>
> The Court responded, inter alia:
>
> "If they are members of the conspiracy and one of them committed an attempt, then, as I see it under this indictment, they could all be found guilty." Tr. page 10-55.

This colloquy demonstrates the confusing nature of this duplicitous indictment. While the Court initially charged that a defendant must be found guilty of both conspiracy and attempt to be found guilty, the remainder of the charge and the express understanding of the Court was to the contrary.

Since two of the original five defendants were acquitted, the jury obviously understood that it could find some defendants guilty of less than all of the crimes charged. The key question, one which is not susceptable to an answer in the absence of pure speculation, is whether or not the jury found some of the remaining defendants guilty of less than all the crimes charged.

Given the confusing nature of the indictment and charge, the permutations of the possible bases for the verdict are indeed numerous. In light of the trial court's understanding, any of the defendant-petitioners might have been found guilty of the conspiracy without being found guilty of attempt. Moreover, any of the three defendant-petitioners might have been excluded from the conspiracy, but found guilty of attempt. The existence of this question creates a distinct possibility that a retrial of any of the three defendant-petitioners, even

on conspiracy alone, will subject him to double jeopardy:

> " . . . a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both . . ." Starks, 515 F.2d 112 at 116.

2. Insufficiency Of The Indictment For Failure To Charge A Crime Under The Laws Of The United States.

As discussed above, the government elected to proceed on retrial of this case on the conspiracy allegation of the indictment. Defendant-petitioners submit that the indictment, following said election, is so deficient as to require its dismissal. Specifically, following the election, the indictment must be read as a conspiracy indictment under principles of law applicable to sufficiency of conspiracy indictments, without the supportive assistance to the sufficiency of the indictment given by the allegations referring to "attempt".

The indictment does not properly charge conspiracy by its failure to allege that the defendants "did . . . conspire" together, or in any way contain charging language that demonstrates that the grand jury found an agreement among all the defendants. Stated another way, the indictment merely suggests that all the defendants "did . . . conspire", without a specific finding that each defendant had conspired with all the others. Although this contention might have appeared somewhat technical when raised before the first trial, the situation is now greatly different. At the first trial, two of the defendants were acquitted. The legal effect of such acquittal is to prevent a petit jury at the second trial from finding that any of the defendants who are standing trial a second time

guilty because they "conspired" with any of the acquitted defendants. Thus, the failure of the grand jury to find that all defendants had conspired "together" as a group makes the present indictment insufficient.

Apart from the consideration argued above, the indictment returned by the grand jury is obviously based on the theory that the defendants "attempted" to commit Hobbs Act extortion. The only allegation in the indictment which even remotely suggests conspiracy is the naked word "conspire"; no other allegations even advert to any suggestion of an agreement, which is the essential element of a conspiracy indictment. At the first trial, this issue was clouded by the duplicitous character of the indictment which allowed the government to get its case to the jury since the indictment did sufficiently charge "attempt". However, now the government has elected to proceed only on "conspiracy" and the indictment must be examined as to its sufficiency to charge this particular offense, without the benefit of the allegations dealing with "attempt", since attempt is not charged. As argued below, the government in the present indictment has, in its draftsmanship of this indictment, run afoul of basic principles of drafting conspiracy indictments.

In this regard, defendant-petitioners rely on the following cases: United States v. Britton, 108 U.S. 199 (1883); Joplin Mercantile Co. v. United States, 236 U.S. 531 (1951); Hamner v. United States, 134 F.2d 592 (5th Cir. 1943); United States v. Deutsch, 243 F.2d 435 (3d Cir. 1957); United States v. Tornaben, 222 F.2d 875 (3d Cir. 1955); United States

v. Knox Coal Company, 347 F.2d 33 (3d Cir. 1965).

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this Court should issue its Writ Of Certiorari to the Court of Appeals for the Third Circuit to review its instant decision.

Respectfully submitted,

THOMAS C. CARROLL
MARK D. SCHAFFER
Attorneys For Alonzo Robinson
Defender Association of Philadelphia
Federal Court Division
Room 904, 21 South 12th Street
Philadelphia, Pennsylvania 19107

RALPH DAVID SAMUEL
Attorney for Larry Starks
2010 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

JOEL H. SLOMSKY
Attorney for Donald Abney
2616 Two Girard Plaza
Philadelphia, Pennsylvania 19102

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS
and ALONZO ROBINSON,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1976
CERTIORARI GRANTED JUNE 14, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS
and ALONZO ROBINSON,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 74-133

Docket Number and Date	Proceedings

5, March 14, 1974 Letter to clerk that indictment be unsealed, etc., filed

June 18, 1974 through July 2, 1974 Crim. Jury Trial: Jury called and sworn

150, June 5, 1975 Petition of Larry Starks to Dismiss Indictment for failure to Charge a Federal Offense and Lack of Jurisdiction in that the indictment is vague and insufficient and Memorandum of Law thereof, filed

151, June 5, 1975 Petition of Larry Starks to Dismiss and/or Quash the Bills of Indictment and Memorandum of Law thereof, filed

152, June 5, 1975 Petition of Larry Starks to Dismiss Indictment—Double Jeopardy, filed

159, June 16, 1975 Govt's answer to deft., Larry Stark's motion for discovery and inspection, bill of particulars, dismissal of the indictment, suppression of evidence and appropriate relief, certificate of service, filed.

162, August 13, 1975 Deft. Abney's Motion to Dismiss Indictment and in Arrest of Judgment and Memorandum of Law in support thereof, filed.

164, August 21, 1975 Govt's answer to deft., Abney's motion to dismiss indictment, filed.

166, August 21, 1975 Deft., Larry Stark's brief in support of his petition to dismiss indictment-double jeopardy violation of fifth amendment to the U.S. Constitution, filed.

Docket Number and Date	Proceedings
167, August 28, 1975	Defts., Larry Starks and Alonzo Robinson's motion to dismiss indictment memorandum of law, filed.
September 2, 1975	Criminal trial: all outstanding motions: all motions denied; all deft waive right to a speedy trial; all defts. to appeal; trial stayed pending decision of court of appeals; J. Slomsky appointed to represent Mr. Abney for appeal. bail cont'd.
180, October 1, 1975	Transcripts of 9/2/75, filed
184, January 29, 1976	Order re: Defendants' motion to dismiss the indictment on the grounds that the indictment subjects defendants to double jeopardy etc., are all severally and jointly DENIED and DISMISSED, filed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED CASES NUMBERED 75-2071
2072
2073

Date	Proceedings
October 6, 1975	Stipulation of counsel for appellants for consolidation pursuant to Rule 3(b), F.R.A.P., filed. (4 cc.). Certificate of service attached.
November 5, 1975	Brief for appellants and appendix filed. (4 cc.).
December 8, 1975	Brief for appellee, rec'd December 15, 1975, filed. Certificate of service by mail on December 8, 1975 appears on Page 24 of brief.

Date	Proceedings
January 29, 1976	Reply brief for appellants received for the information of the Court. (5 cc) Service by mail on January 28, 1976 attached.
February 4, 1976	Certified copy of order dated January 29, 1976 (Van Artsdalen, D.J.) severally and jointly denying and dismissing, nunc pro tunc, effective as of September 2, 1975, defendants' motions to dismiss the indictment on the grounds that the indictment subjects defendants to double jeopardy in violation of the Fifth Amendment to the United States Constitution, that the indictment fails to comply with Federal Rule of Criminal Procedure 7(c)(1), and that the indictment fails to state a federal offense, rec'd from C. of D.C., filed.
February 9, 1976	Submitted on briefs. Coram: Aldisert, Gibbons and Rosenn, C.J.
February 10, 1976	Judgment order (*Aldisert*, Gibbons and Rosenn, C.J.) affirming the judgment of the district court, filed.
February 24, 1976	Petition for rehearing in banc by appellants, filed. (4cc—6 add'l cc rec'd. 2/26/76). Service attached.
March 5, 1976	Order (Seitz, Ch. J., Van Dusen, *Aldisert*, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, C.J.) denying petition for rehearing in banc by appellants, filed.
March 10, 1976	Motion by appellants for stay of mandate pending application to U.S.S.C. for certiorari, filed. (4cc) Service attached.
March 16, 1976	Order (*Aldisert*, C.J.) staying the issuance of the mandate until April 4, 1976, filed.
April 12, 1976	Notice of filing on April 5, 1976, of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S.C. No. 75-6521)

Date	Proceedings
June 21, 1976	Certified copy of order dated June 14, 1976 granting petition for writ of certiorari, and granting motion to proceed in forma pauperis received from Clerk of S.C. filed. (S.C. No. 75-6521)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

UNITED STATES OF AMERICA

v.

LARRY STARKS, CLARENCE L. STARKS, ALONZO ROBINSON, DONALD E. ABNEY, MERRILL A. FERGUSON

INDICTMENT

The indictment in this case as set forth at 515 F.2d 112, 115 at footnote 2, states:

"That from on or about the 8th day of December 1973, to on or about the 21st day of February, 1974, inclusive, at Nookies's Tavern, located at 6301 Wister Street, Philadelphia, Pennsylvania, and the area adjacent to said tavern, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, Larry Starks, Clarence Louis Starks, Alonzo Robinson, Donald Everett Abney, and Merrill Albert Ferguson, did unlawfully and willfully conspire and attempt to obstruct, delay and affect commerce, as that term is defined in and by Section 1951, Title 18, United States Code, to wit, interstate commerce, and the movement of articles and commodities in such commerce by extortion, as that term is defined in and by Section 1951, Title 18, United States Code, that is to say, by then and there attempting to obtain from another, to wit, one Ulysses J. Rice, then doing business under the name, style and description of Nookie's Tavern, and then engaged in the sale of alcoholic beverages contracted for and obtained in interstate commerce, certain property of said Ulysses J. Rice, to wit, his money in amounts varying from One Hundred Fifty Dollars ($150.00) to Five Hundred Dollars ($500.00) to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate com-

merce, the attempted obtaining of said property from said Ulysses J. Rice as aforesaid being then intended to be accomplished with the consent of said Ulysses J. Rice induced and obtained by the wrongful use to wit for the purpose aforesaid, of actual and threatened force, violence and fear made to said Ulysses J. Rice.

In violation of Section 1951 of Title 18, United States Code."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF PRE-TRIAL CONFERENCE IN CHAMBERS

June 14, 1974

Before HON. DONALD W. VAN ARTSDALEN, J.

(Appearances Omitted in Printing)

* * * *

[37] MR. CARROLL: On this matter of the indictment that was raised by Mr. Myers, I just want to make perfectly clear, Your Honor, our position in addition to all other [38] positions that have been taken on this.

When the motion to dismiss the indictment was argued in this case my recollection is that Mr. Slomsky, took the position that the conspiracy count and the contempt count should not be joined in a single count in the indictment. I believe I joined in that position.

My recollection, although perhaps my recollection is faulty, is that Your Honor indicated that perhaps a motion to elect would be the proper procedural means to raise this question, that is a motion to force the Government to elect between an attempt and conspiracy.

When I received Your Honor's order dated June 4, 1974, in Paragraph 1 of the Bill of Particulars, I took that to mean that Your Honor had changed your mind concerning the election, because what Your Honor has said there is that the Government shall file a Bill of Particulars as to whether the Government intends to prove either a conspiracy or an attempt, or both.

Now, the way the Government has responded to Your Honor's order is indeed to take the position that they were going to prove both.

Do I correctly assume that Your Honor's order of June 4 is a denial of our motion for election?

THE COURT: You do not correctly so assume.

I simply asked the Government to state what [39] its position was. The Government in its Bill of Particulars has stated what its position is.

It is up to defense counsel, it seems to me, to raise any objection that they wish to that either at the time of trial or at such other time as defense counsel think is appropriate.

MR. MYERS: I am raising my objection, as I have, to the election in the manner in which they have stated.

MR. CARROLL: I specifically move that they be compelled to elect so that there is no ambiguity in this.

MR. MYERS: I join in that.

MR. MOZENTER: I join in that.

THE COURT: You oppose that motion?

MR. BRAVO: Yes, Your Honor.

THE COURT: All right. Those motions are denied.

Is there anything further, gentlemen, that we can do at this time?

(No response.)

Thank you very much.

(Concluded at 2 o'clock P. M.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF TRIAL
Philadelphia, Pa., June 27, 1974

Before HON. DONALD W. VAN ARTSDALEN, J.,
(and a Jury)

EIGHTH DAY

(Appearances Omitted in Printing)

* * * *

[8-145] THE COURT: Does anyone have any further motions?

I think you indicated that you had, Mr. Carroll.

MR. CARROLL: If Your Honor please, this again perhaps runs rather close to your charge but I would like to just put it on the record at this time.

[8-146] I again renew our motions to elect, to compel the Government to elect between attempt and conspiracy now that the defense has closed their case.

If Your Honor is not inclined to grant that motion, I am going to request, and I have not discussed this with cocounsel as to their positions in this matter, but I am going to request that Your Honor follow the procedure that has been followed in some cases, and in particular the case of the United States v. Varelli, Seventh Circuit, 1969 case, concerning directions to the jury to marshal evidence in a conspiracy prosecution. That is to say that I am going to request the Court at the ap-

propriate time to actually direct the jury what pieces of evidence are admissible against which defendants on which particular aspect of this one-count indictment.

As I have previously indicated to the Court, I think it is going to be a herculean job for perhaps both the Court and for the jury to segregate out these various pieces of evidence. But I think that on the posture of this case as it exists now, particularly since Your Honor did read the transcript yesterday concerning the witness Marie Reichardt's testimony about my client Alonzo Robinson, it becomes increasingly evident that the only link between what we refer to as these two conspiracies is an out-of-court statement by Larry Starks.

[8-147] In any event, sir, I first move for election, and in the event that is denied then I move for marshal of proof in accordance with the Varelli case.

THE COURT: Does the Government oppose that move for election?

MR. BRAVO: Yes, we do, Your Honor.

THE COURT: That motion will be denied.

These other matters we will discuss at conference.

MR. SLOMSKY: Just one thing on the record.

Mr. Carroll said he had not discussed it with other counsel. I would join in with Mr. Carroll's request.

THE COURT: All right.

Gentlemen, we will recess this case until 9:45 tomorrow morning, bearing in mind that if you are involved in some other case, you are, that's all.

MR. MYERS: I would agree with the Government. I would like to know before tomorrow, and I have presented no defense based on my understanding that I would have last speech.

THE COURT: We will discuss that in conference.

MR. MYERS: All right.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF TRIAL
Philadelphia, Pa., July 1, 1974

Before HON. DONALD W. VAN ARTSDALE, J.,
(and a jury)

TENTH DAY

(Appearances Omitted in Printing)

[10-3] CHARGE OF THE COURT

VAN ARTSDALEN, J.

Good morning, members of the jury and counsel. I hope that all of you had a pleasant weekend.

Members of the jury, it is now my province to instruct you as to the law that you are to apply in reaching your verdict. How you proceed when you start your deliberations and during your deliberations is really a matter that is entirely up to you. One of you should be appointed as the foreman or the forelady, the duty of such foreman or forelady being to announce the verdict when and if a verdict is rendered, and also to act as your spokesman both during your deliberations and at any other time that it might become necessary during your deliberations, if any, to communicate with the Court.

Ordinarily the number 1 juror acts as the foreman or the forelady, unless someone else is particularly well

qualified, or for any other reason that you the jurors may determine that you wish to have someone else act in that capacity.

The instructions that I am going to give you are instructions as to the law only that should be applied in this case. That is to say that the determination of the facts, as all counsel have pointed out to you repeatedly, is a matter that is entirely up to you, the jury.

[10-4] In these instructions I will refer very little if at all to the facts of the case. I do not intend to express any opinion to the jury as to the facts, and I don't want the jury to interpret anything I say as expressing any opinion as to the facts of this case, or as to any particular verdict which the jury may bring in. That is your task and your task alone to reach the verdict, and you should be wholly uninfluenced about what other persons might think or what other persons might do were they in your position.

Obviously, I can't give you all of the instructions at any one time, and I have to give some first and some later. Some of the instructions may be a little bit more complicated and may take a little longer than others to explain. I want you to bear in mind, however, that all instructions are important and no one instruction is to be considered of any greater or lesser importance or significance than any other instruction. All instructions must be considered in reaching your verdict.

Again, as all counsel have told you, you must accept the statements of law that I give to you; you must apply the principles of law as I explain them to you in reaching your verdict. This is true irrespective of whether or not you agree that that is what the law is, or whether you agree that that is what the law ought to be, or whether you think it is fair and just and reasonable. The reason for this is because [10-5] all cases and issues involving the same legal issues must be decided by the same rules of law, although different law may, of course, be applicable in different factual situations and in different cases.

Counsel have also correctly pointed out to you many times that it is the duty of you the jury collectively to recall all of the testimony and all of the evidence in the case. And if the attorneys in their arguments, either in

their opening or closing, misstated any facts to you, or if in these instructions I should refer to any facts or the testimony which disagrees with your individual and your collective recollections of the testimony and the evidence, accept your own recollections and not that of mine or of counsel.

Also I would point out that opinions of counsel as to what your verdict should be are in no way to be considered as evidence.

Arguments of counsel to the jury are to assist you in analyzing the case and in reaching a proper verdict.

Justice through trial by jury must always depend upon the willingness of each and every one of you as individual jurors to find the truth as to the facts from the evidence presented, and to arrive at a verdict by applying the law as given in the instructions by the trial judge.

As I am sure is obvious to all of you, you are [10-6] to determine this case based on the testimony and the evidence, and solely on that. You are to reach your decision without any bias or prejudice, sympathy or other purely emotional reaction towards, for or against any party, witness, counsel or anyone else involved in the case.

The law does not permit you to be governed by sympathy, prejudice, public opinion or emotion.

In other words, in determining this case look at it purely objectively, determine what the facts are and then apply the law as I inform you the law to be, and come to your decision and your verdict irrespective of any emotional reaction or impulse that you may have towards the case.

I say to you further that you are not to be concerned with the effect that your verdict may have upon anyone, regardless of what that verdict may be. Any verdict which you return must be a unanimous verdict, that is to say all 12 of you must in good conscience agree with the verdict that has been returned.

Counsel have mentioned to you repeatedly, and I believe that I have informed you when you were being selected, that the law presumes a defendant, and in this case all defendants, to be innocent of crime.

In this case all defendants on trial come into court with what is called a clean slate, presumed to be innocent, and that presumption remains with them throughout [10-7] the trial of this case until and unless you find beyond a reasonable doubt from all of the evidence that the defendants, or any one or more of them, is or are guilty beyond a reasonable doubt. And until and unless you are so satisfied, the presumption of innocence will remain. And in that event it will be your duty to acquit such defendant or defendants as to whom you have a reasonable doubt.

The presumption of innocence applies to each defendant, and should you find that as to one or more defendants the Government has overcome that presumption of innocence by proof from the evidence of guilt beyond a reasonable doubt, the presumption of innocence will nevertheless remain as to all other defendants as to whom there is not proof from the evidence of guilt beyond a reasonable doubt.

The presumption of the defendants' innocence is not an idle phrase to be taken lightly by the jury. Every juror is bound to entertain a conscientious, sincere and ungrudging, without any mental reservations or evasion whatever, and to give all defendants the full benefit of it. It is an important right belonging to every person accused of a crime and such presumption of innocence continues throughout the trial until it is overcome by evidence, and evidence alone to the exclusion of all reasonable doubt on the part of each and every member of the jury.

The defendants, although accused by the indictment [10-8] which is the formal charge that will go out with you so that you may read it, begin the trial with a clean slate and with no evidence against them. The law permits nothing but legal evidence to be presented before the jury or to be considered by the jury in reaching its verdict, and it is for that reason that in this case there were many conferences that were held in your absence, many things that had to be decided in your absence, not because counsel nor I wish to keep from you any relevant or proper facts for you to consider, but simply because under the law there is certain evidence that is permitted and certain types of things that are not permitted to be presented to a jury. And this is so that the jury can decide the case solely on competent legal evidence.

The presumption of innocence alone requires a jury to acquit a defendant unless the jury is satisfied beyond a reasonable doubt of guilt after a careful and impartial consideration of all of the evidence in the case.

It therefore becomes necessary for me to define to you what is meant in the law by "reasonable doubt." It is somewhat self-explanatory.

A reasonable doubt is a fair doubt based upon reason and common sense, and arising out of the evidence or lack of evidence. It is obviously rarely possible to prove anything to an absolute certainty or beyond all possible doubt. Proof beyond a reasonable doubt is such proof as you [10-9] would be willing to rely upon and unhesitatingly act upon in matters of the greatest importance in your own affairs. No defendant can be convicted on mere whim, suspicion, guess or conjecture. Guilt may only be founded upon solid, convincing evidence as leaves no reasonable doubt of guilt.

As I have indicated, a reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden of proof is always upon the Government, that is the prosecution, to prove an accused guilty beyond a reasonable doubt, it is necessary to prove every essential element of the crime charged beyond a reasonable doubt, and all defendants have the right to rely upon the failure of the prosecution to establish such proof. In other words, no defendant is ever required to prove anything, and no defendant has the burden of proving anything. The burden is that solely of the Government and remains that of the Government throughout the trial of the case.

A defendant may also rely upon evidence brought out on cross-examination of witnesses called by the prosecution.

A reasonable doubt means in the law just what the word implies, namely, a doubt founded upon reason. It must not arise solely from a merciful disposition or a kindly or sympathetic feeling, or the possible desire to avoid what might be regarded by some as a disagreeable duty. It must [10-10] not be a mere whim or a vague conjectural doubt or a misgiving founded upon mere guess or speculation. It must be an honest doubt, such as would make an honest, sensible and fair-minded person hesitate to act in a most serious and important matter wherein ascertainment of the truth was conscientiously being sought.

It is sometimes said that to prove something beyond a reasonable doubt means to prove it to a moral certainty. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

If the jury in this case should view the evidence as reasonably permitting either of two conclusions, one of innocence and the other of guilt, as to any particular defendant, the jury must adopt the conclusion as to that defendant or defendants of innocence, and render a verdict of not guilty or a verdict of acquittal as to that defendant or defendants.

This case arises upon an indictment which is, as I have said, merely a formal method of accusing the defendant of a crime and bringing him before a jury. It is not evidence of any kind against the accused and it creates no presumption nor does it permit any inference of guilt.

I have told you that your decision must be [10-11] based solely upon the evidence in the case. Therefore, it becomes essential that you understand what we mean by evidence.

One type of evidence is what we call direct evidence, such as the testimony of an eyewitness.

In this case most if not all of Mr. Rice's testimony will be called direct testimony or direct evidence.

The other type of evidence is called circumstantial evidence, that is reasonable inferences gleaned from other evidence. It is proof by a chain of proved facts, the circumstances of which point to the conclusion of the commission of an offense.

As a general rule, the law makes no distinction between direct or circumstantial evidence but simply requires before convicting any defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence, both direct and circumstantial. However, if a case is based primarily on circumstantial evidence, each fact essential to complete those circumstances leading towards guilt must be proved beyond a reasonable doubt. Proof of guilt by circumstantial evidence must not only be consistent with guilt but it must be inconsistent with innocence before a jury could convict on circumstantial evidence alone.

Unless you have been or are hereafter otherwise instructed, evidence consists of the sworn testimony of the witnesses under oath, regardless of by whom those [10-12] witnesses may have been called, regardless of whether the testimony was brought out on what we call direct testimony, that is in response to questions put to the witness by the party who called the witness, or whether on cross-examination, which I am sure all of you understand means when the other side asks questions of the witness.

It also includes the exhibits that were offered and received into evidence, some or all of which will go out with you when you deliberate upon the case.

Evidence consists of those factors which I have just described to you, irrespective of whether they were produced by the prosecution or by a defendant, and whether on direct or cross-examination. Throughout the course of the trial in this case there have, of course, as in all trials, been various objections made to questions or answers that have been given to questions, and I have previously indicated to you the reason for that. But I would like to review that again for you briefly.

I would say to you that it is the duty of counsel to object to testimony which counsel in good faith feels is not proper for a jury to hear or to consider. And, as I have indicated, where an objection is made, I as the trial judge am required to rule on that objection. You are in

no way to be influenced by the rulings that I have made on objections other than any specific instructions that I may have [10-13] given to you at the time that the rulings were made. In other words, obviously, it makes no difference to the consideration of the jury which side made the most number of objections or which side's objections I may have sustained more times than any other side, or my manner in ruling upon any objections. Those types of considerations would be completely improper.

However, as to any evidence or any answers or questions that I directed should be stricken or disregarded by the jury, the jury must entirely disregard in reaching its conclusion.

Also, if an objection was made to a question and that objection was sustained, it would, of course, be entirely improper for the jury to speculate as to what answer might have been given had that answer been permitted.

And additionally as to any question to which an objection was sustained, the jury may draw no inference from the wording of the question itself or speculate as to what would have been said or what answer would have been given.

I would point out that the questions that are asked by counsel are not evidence, but rather the answers that are given by the witness on the witness stand. Anything that you may have seen or heard outside of the courtroom, whether prior to or during the course of this trial, is not evidence and it must be disregarded by the jury entirely in reaching its decision.

[10-14] No jury should discuss anything other than the evidence produced so far as the facts of this case are concerned. So, as I have indicated, you are to consider only the evidence in the case but in considering that evidence you are not limited simply to the bald or the literal statements of the witnesses on the witness stand, nor solely to the exhibits. You are permitted under the law to draw from the facts which you find have been proved such reasonable inferences as seem to you justified in the light of your experience. You are to take with you your good common sense as reasonable ladies and gentlemen in determining what the facts are. You are, in other

words, to use your common sense in analyzing the testimony and the evidence and in reaching your ultimate decision.

I have mentioned to you the word "inference." An inference is a deduction or a conclusion which reason and common sense leads you to draw from those facts which have been established and proved by other evidence in the case.

In the course of this trial there has been reference to the credibility of witnesses, and all counsel have argued extensively to you on the question of the credibility of witnesses. This is always a matter of great importance to a jury in reaching its decision, especially where there is a dispute as to the facts, or where all witnesses do not agree as to those facts. Because in this case to a large extent the [10-15] prosecution's or the Government's case depends upon the testimony of Mr. Rice, his credibility is, of course, of crucial importance to you. By credibility of witnesses, we mean the accuracy of the testimony given by the witnesses on the witness stand under oath as to those matters that are material to the issues in the case.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief, and whether that witness is accurate in the testimony he or she gives. You may consider the apparent intelligence of the witness, the motive, if any, of the witness, the state of mind, the demeanor and the manner while testifying on the witness stand. Consider also the witness's ability to see, observe, know and relate to you those matters about which he or she testifies, and whether he or she impresses you as having an accurate and honest recollection in the matters about which testimony is given.

You may also consider the possible interest of any witness in the outcome of the case. This is not to say, however, that because a witness may be interested in the outcome of the case that his or her testimony is any more or any less trustworthy than any other testimony, but it is a matter which the jury has the right to consider.

[10-16] If there are inconsistencies or discrepancies in the testimony of any particular witness, or between the testimony of different witnesses, that should also be taken into consideration by the jury in determining what testimony to accept and what to reject.

Evidence that at some other time a witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's testimony at the trial may be considered by the jury for the sole purpose of judging the credibility of the witness, but it may never be considered as evidence or proof of the truth of any statement made by the witness out of court.

Two or more witnesses to a particular incident or transaction may see and hear it differently, and they may honestly not fully remember the incident due to a failure of recollection. In weighing the effect of a discrepancy, if you find any, always consider whether it pertains to a matter of importance or is some unimportant detail; and also whether that discrepancy arises from an innocent mistake or whether it comes from an intentional falsehood.

There is a principal of law that if a jury finds any witness has been deliberately and intentionally false about any material part of his or her testimony, the jury has the right, if it wishes do so, to disregard that witness's testimony in its entirety. However, a jury is never required [10-17] to do that. The jury can give such witness's testimony the weight that the jury feels it deserves because it is entirely possible that a witness may be deliberately and intentionally false about some material part of his testimony and yet all together accurate and truthful about other parts of his testimony, and it is after all the duty and the job of the jury to find out what the true facts are. Therefore, the weight of the evidence that you give to the testimony of such a witness, and of all witnesses, is entirely up to you.

The Government is never required to call all possible witnesses who may have some knowledge of the case or who might be reasonably expected to corroborate, that is to verify testimony of other witnesses if called to testify. However, in determining whether the Government

has proved a defendant guilty beyond a reasonable doubt the jury may consider whether testimony was corroborated where corroboration was apparently available.

As I have indicated to you, a reasonable doubt may arise both out of evidence or lack of evidence. Therefore, ladies and gentlemen, the question of what witnesses you are going to believe, the extent to which you are going to believe them, the credence that you are going to give to the testimony of the witnesses, the weight, if you want to call it weight, that you are going to give each witness's testimony is a matter that is entirely up to you. It is an important matter [10-18] for you to determine. But after considering all of the testimony, you should then determine the actual facts as to what happened in this case.

Credibility is, of course, important because the Government must establish guilt beyond a reasonable doubt based upon competent, credible evidence. In judging credibility of witnesses you may and you should apply those everyday tests that one normally utilizes when conscientiously seeking out the truth in matters of importance.

I have indicated to you that the law never imposes any burden on the accused, and the accused need do nothing and need prove nothing. And I would specifically and expressly call attention to the jury that the law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the failure of a defendant to testify.

In every crime there must be a joinder of both an act and a criminal intent, and the burden is always on the prosecution to prove both the criminal act and the specific intent beyond a reasonable doubt. And, therefore, we say that a person must unlawfully, wilfully and knowingly act and do the criminal act charged before he may be convicted of a crime.

Therefore, I would like to define to you what [10-19] we mean by "unlawfully, wilfully and knowingly" as meant in the law.

Unlawfully means contrary to law, in violation of the law. To do an act unlawfully means to do wilfully something which is contrary to law.

An act is done wilfully if done voluntarily and intentionally, and with a specific intent to do something that the law forbids, that is to say with a bad purpose either to disobey or to violate the law.

A person who knowingly does an act which the law forbids, intending with bad purpose either to violate or disobey the law, may be found to act with an unlawful intent. An act or a failure to act is knowingly done if done voluntarily and intentionally, and not because of mistake, accident or other innocent reason.

Specific intent to violate or disobey the law or to do that which the law forbids may be proved by direct or by circumstantial evidence. In some instances, and indeed in many cases intent can only be shown by circumstantial evidence because the question of a person's intent is what that person is thinking, what his mental processes are.

Often there is no way of knowing directly what a person may think or what his intentions may be. As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly [10-20] done and a jury may draw the inference and find that a person intends all of the natural and probable consequences which one standing in like circumstances, possessing like knowledge should reasonably have expected to result from an act knowingly done or knowingly omitted to be done.

Members of the jury, there are, as you know, presently on trial before you five defendants. It is your duty to give separate, individual, personal consideration to the case and the charge against each individual defendant. When you do so you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined from the evidence as to his own acts and statements and

conduct and any other evidence in the case which may be applicable to him.

Now we will come to the specific charges in this case.

The indictment has been read to you but I am going to read it to you again. It charges as follows—and this copy of the indictment will go out with you:

That from or about the 8th day of December, 1973, to on or about the 21st day of February, 1974, inclusive, at Nookie's Tavern, located at 6301 Wister Street, Philadelphia, Pennsylvania, and the area adjacent to said tavern, in the [10-21] Eastern District of Pennsylvania, and within the jurisdiction of this court, Larry Starks, Clarence Lewis Starks, Alonzo Robinson, Donald Everett Abney, and Merrill Albert Ferguson, did unlawfully and wilfully conspire and attempt to obstruct, delay and affect commerce, as that term is defined in and by a section of the statute, to wit, interstate commerce, and the movement of articles and commodities in such commerce by extortion, as that term is defined in the Act, that is to say, by then and there attempting to obtain from another, to wit, one Ulysses J. Rice, then doing business under the name, style and description of Nookie's Tavern, and then engaged in the sale of alcoholic beverages contracted for and obtained in interstate commerce, certain property of the said Ulysses J. Rice, to wit, his money in amounts varying from $150 to $500 to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate commerce, the attempted obtaining of said property from said Ulysses J. Rice as aforesaid being then intended to be accomplished with the consent of said Ulysses J. Rice, induced and obtained by the wrongful use, to wit, the use for the purpose aforesaid, of actual and threatened force, violence and fear made to said Ulysses J. Rice. In violation of the statute.

Members of the jury, it is necessary for me therefore to define to you what specifically is charged in this [10-22] indictment.

The indictment is drawn pursuant to a federal statute, that is a law of the United States that was enacted by

Congress. That law in its parts that are pertinent to this case are as follows. The act or the statute says:

Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce by extortion, or attempts or conspires so to do, or threatens physical violence to any person or property in furtherance of a plan or a purpose to do anything in violation of this Act, is guilty of an offense against the United States.

The statute or the Act further goes on to say and to define:

As used in this section, the term "extortion," means the obtaining of property from another with his consent induced by the wrongful use of actual or threatened force, violence and fear.

The Act further provides: The term "commerce" means all commerce between any point in a state and any point outside thereof.

You will note, ladies and gentlemen, that the statute is written in broad language. Its purpose is to make unlawful all interference with interstate commerce by extortion. Attempts and conspiracies to interfere with [10-23] interstate commerce by extortion are made unlawful as well as the substantive offense of actual interference with interstate commerce by extortion.

By interference with interstate commerce, I mean obstruction, delay or harmful effect upon interstate commerce in any way or degree by extortion.

Interstate commerce means the commercial transportation of goods and merchandise, and articles and commodities from one state to another. That is the movement of goods and commodities in commerce between and among different states of the United States.

There is testimony from which the jury could find some of the liquor which Mr. Rice purchased for retail sale in his bar or taproom was distilled, processed or bottled outside of Pennsylvania and in states other than Pennsylvania, and was transported into Pennsylvania where it was purchased and warehoused by the State of Pennsylvania or one of its agencies, I believe it was the State

Liqour Control Board, for sale and wholesale to taproom owners, including Mr. Rice.

It is not essential that the Government in this case prove the total volume or the amount or the proportionate amount of such liquor or the value thereof that may have been involved in interstate commerce, or that was purchased from outside of Pennsylvania. If you find beyond a reasonable doubt that some of the liquor that was purchased by Mr. Rice [10-24] was originally distilled, processed or bottled outside of Pennsylvania and was transported into Pennsylvania as a regular part of commerce, whether that transportation was by truck, railroad or other means of transportation, and that it was sold and delivered to Mr. Rice as a continuous part of the distributive chain in rea ng the ultimate consumer from the distiller, bottler or processor, you could properly find that such liquor was a part of interstate commerce and that such liquor constituted articles and commodities traveling in interstate commerce.

In addition to the requirement that the Government in order to prove the so-called substantive offense of interference with interstate commerce by extortion, must prove beyond a reasonable doubt that some of the liquor purchased by Mr. Rice was involved in or a part of interstate commerce, the Government would have to further prove beyond a reasonable doubt that such interstate commerce, that is the interstate transportation of such liquor, was in some way or degree obstructed, delayed or adversely or harmfully affected by the extortion.

Mr. Rice has testified that his business declined during the late fall of 1973 and early 1974. If you find beyond a reasonable doubt that there was a loss of business which was caused by a conspiracy and attempt to extort money from Mr. Rice, then you could find beyond a reasonable doubt that interstate [10-25] commerce was in fact obstructed, delayed and adversely affected, provided some of the liquor which Mr. Rice bought was found to be involved in interstate commerce.

However, the defendants are charged not with the so-called substantive offense itself but rather with a conspiracy and attempt to obstruct, delay and affect inter-

state commerce by extortion. If the jury should find beyond a reasonable doubt that there was a conspiracy and an attempt to extort money from Mr. Rice, the natural and probable consequences of which conspiracy and attempt, if successfully carried out, would be to obstruct, delay and adversely affect interstate commerce in any way or degree, the offense charged in the indictment of conspiracy and attempt would be complete, and the jury could properly convict all defendants found beyond a reasonable doubt to be members of the conspiracy and attempt.

In other words, actual obstruction, delay or harmful effect on interstate commerce need not be proved provided the Government proves beyond a reasonable doubt that the natural and probable consequences of the conspiracy and attempt to extort money from Mr. Rice, if carried to successful conclusion, would be to obstruct, delay and adversely affect interstate commerce in any way or degree.

Obviously, it becomes necessary for me to define both "conspiracy" and "attempt," since the defendants [10-26] are charged not with the substantive offense itself of obstructing, delaying or adversely affecting interstate commerce by extortion but rather a conspiracy and attempt so to do.

Therefore, I shall define to you all of the requisites of both a conspiracy and an attempt, because all of these requisites must be found before the jury could find any defendant guilty.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose by unlawful means.

So a conspiracy is a kind of partnership in criminal purpose in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey or violate the law. Mere similarity of conduct among various persons, and the fact that they may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly by word spoken or in writing stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the [10-27] object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the members in some way or manner, or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan or scheme.

The evidence in the case need not establish that all of the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all means or methods which were agreed upon were actually used or put into operation, nor that all of the persons charged to have been members of the alleged conspiracy were such.

What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to affect or accomplish some object or purpose of the conspiracy as charged in the indictment, and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the indictment.

One may become a member of a conspiracy without full knowledge of all of the details of the conspiracy, on the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator. [10-28] Before the jury may find that a defendant or any other person has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

As I have indicated to you previously, to act or participate wilfully means to act or participate voluntarily and intentionally and with a specific intent to do something the law forbids, that is to say, to participate with bad purpose either to disobey or violate the law.

So if a defendant, or any other person, with the understanding of the unlawful character of the plan, knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant and a conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury must consider only his acts and statements. He [10-29] canot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of its members, established by proof other than the statements of other members of the conspiracy.

Each person charged must be considered separately and individually by the jury. I have indicated to you that mere association alone, among or between two or more persons charged as conspirators or similarity of action does not establish a conspiracy. Mere similarity of conduct among various persons and the fact that they may have been associated with each other and may have been together and discussed common interests does not necessarily establish proof of a conspiracy.

It is, of course, not necessary that the Government prove that each person to the conspiracy knew all of the details, or means or methods to be used, or that he had knowledge of all of the other persons involved in the conspiracy, or that they were all members at the inception, or that they all played important roles.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the state-

ments thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found [10-30] to have been a member even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy. Otherwise any admission or statement made or act done outside of court by one person may not be considered as evidence against any other person who was not present and did not hear the statement made or see the act done.

Therefore, any statements made by any person found to be a conspirator which were not done in furtherance of the conspiracy, or were made before its existence or after its termination may not be considered as evidence against any other person found beyond a reasonable doubt to be a member of the conspiracy.

In your consideration of the evidence in this case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that the conspiracy did exist you must next determine whether or not the accused wilfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed, and that the defendant wilfully became a member of the conspiracy either at its [10-31] inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common object or purpose, and in fact may have failed in so doing.

The extent of any defendant's participation moreover is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a very minor part in the conspiracy.

An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

Therefore, there are four essential elements that are required to be proved beyond a reasonable doubt in order to establish the offense of conspiracy charged in this indictment.

First, that the conspiracy described in the indictment was wilfully formed and was existing at or about [10-32] the time alleged in the indictment which is between December 8, 1973 up to and including the 21st of February, 1974.

Second, that the accused wilfully became a member of the conspiracy.

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged.

And, fourth, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

If the jury should find beyond a reasonable doubt from the evidence in this case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete, and it is complete as to every person found by the jury to have been wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

A person cannot, of course, conspire with himself and, therefore, you cannot find any defendant guilty unless you find beyond a reasonable doubt that such defendant conspired, as I have defined that term to you, and [10-33]

as charged in the indictment, with at least one other person.

The indictment in this case charges a single overall conspiracy among all five defendants. It is but a single and identical charge as to all defendants. Before you may convict any defendant you must find beyond a reasonable doubt that such defendant was a member of the conspiracy as charged, that is a conspiracy that attempted to obstruct, delay and adversely affect interstate commerce by extortion. Rather I should say that it was a conspiracy and attempt to obstruct, delay and adversely affect interstate commerce by extortion.

If you find beyond a reasonable doubt that there was such a conspiracy formed, and that the conspirators attempted to carry out the unlawful conspiratorial plan and scheme, then any and all of the defendants as to whom you are satisfied beyond a reasonable doubt took part in that conspiracy, you may find guilty as members of that conspiracy. If, of course, you are not satisfied beyond a reasonable doubt that there was a conspiracy as charged in the indictment, all defendants must be acquitted.

To put it another way, if you find there was no conspiracy as charged in the indictment, then obviously no defendant may be found guilty.

If you find that one or more of the defendants did or committed certain acts but were not members of the [10-34] conspiracy charged in the indictment but were in fact members of another separate conspiracy not charged in the indictment, then you must return a verdict of not guilty as to such defendant or defendants whom you find not to be members of the conspiracy charged in the indictment.

There may, of course, be found by the jury to be a single overall conspiracy with different parties joining or leaving the conspiracy at various times.

It is not necessary that the Government prove beyond a reasonable doubt that all of the defendants personally had any direct dealings with Mr. Rice in order to prove the conspiracy charged in the indictment. What must be proved beyond a reasonable doubt is that each defendant found to be a member of the conspiracy charged had some

part in the scheme of things, that each such defendant had some role, large or small, to play in the overall plan and scheme to obstruct, delay and adversely affect interstate commerce by extortion.

I have instructed you that before a person may be found guilty of a charge of conspiracy not only must there be proof beyond a reasonable doubt that such person was a member of the conspiracy charged in the indictment but also that there be proof beyond a reasonable doubt of the commission by one or more of the conspirators of an overt act, that is an act knowingly committed in an effort to accomplish some object or purpose of the conspiracy.

[10-35] In this case the defendants are charged with a conspiracy and attempt, both as integral and essential parts of the single charge.

An attempt to commit an offense requires that a wilful act be done in an effort to bring about or accomplish that which the law forbids to be done, bearing in mind the definition that I have already given to you of wilful. An attempt would, of course, constitute an overt act provided you find that there is a conspiracy, and an attempt to obstruct, delay or adversely affect interstate commerce by extortion.

An attempt requires that there be an affirmative wilful act to accomplish that which the law forbids, which if such act were successfully executed and carried out would constitute all of the essential elements of the substantive offense. Normally, therefore, an attempt is such activity that but for some fortuitous or unforeseen or unanticipated occurrence or event, uncontrolled by the actor, the crime itself would have been complete.

It is, of course, also necessary that you understand clearly what is meant by "extortion" as used in this statute.

The statute defines extortion as the obtaining of property from another with his consent, induced by the wrongful use of actual or threatened force, violence and fear.

There is no evidence in this case whereby the [10-36] jury could find any actual force or violence. It will be for

you the jury to determine whether there was any threatened force or violence.

To extort money by fear means to instill such fear into the mind of another that such person out of fear consents to and does deliver property, in this case money, to or at the direction of the person instilling such fear. The fear may be physical violence to some person or property, or the fear of economic or business loss or harm. It need not be solely fear for one's self or one's own property but may include fear as to any person or any person's property. The fear must, however, be voluntarily and wilfully instilled or induced into the mind of the person being extorted, and for the specific purpose of obtaining, as applicable to this case, money from the person placed in fear, although with his consent.

The fear need not be instilled by any actual force or violence. A threat may exist and be communicated to another even though the language used and literally construed would not amount to a threat. It may be communicated by innuendo from words spoken; direct threatening words need not be used. It may be communicated by a combination of words spoken and a course of conduct on the part of the one who seeks to create the understanding in the mind of another that there is a threat.

[10-37] The term "fear" means a state of anxious concern, alarm or apprehension. The instilling of the fear must also be wrongful.

As to the charges in this case of conspiracy and attempt to interfere with interstate commerce by extortion, there need be no proof of actual fear, provided there is proof beyond a reasonable doubt that part of the plan of the conspiracy was to instill such fear as to accomplish the purpose of the conspiracy. That is to say, to instill such fear as to obtain the money sought to be extorted.

Specifically it need not be proved that in fact Mr. Rice was placed in fear, provided the object and purpose of the conspiracy was to instill such fear into Mr. Rice as to obtain by extortion from Mr. Rice, with his consent, and the effect of which was to delay, obstruct and harmfully affect interstate commerce or the probable consequences of which would be to do so.

Wrongful as used in the statute limits the coverage of the statute to those instances where the obtaining of the property would itself be wrongful because the alleged extortionist has now lawful claim to that property. Extortion requires an intent to obtain that which in justice and equity the party is not entitled to receive. It requires that the demand or threat be unlawful in the sense that there be no legitimate right to make such a demand or threat in order to [10-38] obtain the property extorted, in this case money from Mr. Rice.

There was testimony by Mr. Rice in this case that he was afraid of one of the defendants because of that defendant's reputation.

You may consider that testimony only as to whether or not Mr. Rice was in fact placed in fear. The reputation of that defendant is not otherwise in issue and it may not be considered in any other way.

To be guilty of the offense charged the Government need not prove that the defendant or any defendant personally profited or intended personally to profit or to receive any of the proceeds of the money extorted, provided the money was to be obtained by the wrongful use of threatened force, violence or fear, as I have defined those terms to you.

There has been some testimony about the possible involvement of Mr. Rice in the use and/or the sale or possession of narcotics. This may properly be considered by the jury in determining Mr. Rice's credibility as a witness, and as argued to you by counsel, and in weighing his evidence. However, even if the jury should suspect, believe, or find as a fact that he was a user, possessor, seller or dealer in narcotics, this would in no way permit or justify anyone in conspiring and attempting to obstruct, delay and adversely affect interstate commerce by extorting money from Mr. Rice [10-39] by the wrongful use of threatened force, violence and fear.

The same may be said concerning Mr. Rice's finances and his success or failure as a businessman, except as it may affect his credibility. Also his reputation or whether he is a good man or a bad man has nothing to do with

the charges in this case, except as you may properly consider it in determining his credibility.

Obviously, this charge being a single conspiracy and attempt to obstruct, delay and adversely or harmfully affect interstate commerce by extortion does not require proof that the conspiracy was successful, or that it's unlawful objectives were obtained. The offense charged may be proved even though the conspiracy and attempt failed because the extortion was not successfully carried out.

Now, I would call attention to one other piece of evidence, and that is the tape which you heard. It was permitted into evidence merely to corroborate the oral testimony of Mr. Rice on the witness stand.

If you heard something on the tape said by someone whose voice you did not recognize as that of Mr. Rice, whom you did hear testify in court, you must entirely disregard that unless Mr. Rice himself expressly testified that that person made such a statement, and that he so testified while on the witness stand.

Members of the jury, during the course of the [10-40] trial I have told you not to consult or talk about the case even among yourselves or with anyone outside of the courtroom, but now when the case is given to you, obviously, you should consult with each other, express your views among each other and consider the views of each other, but each of you must decide the case for himself or herself, and to do so only after an impartial consideration of all of the evidence in the case.

Remember that at all times you are not partisans, you are the judges of the facts and your sole duty is to seek out the truth from the evidence and return a verdict in accordance with that as you find it.

Remember also that the question before you is not will the Government win or lose, because I say to you that the Government always wins when justice is done in any particuar case regardless of whether the verdict is guilty or not guilty.

You are concerned only with returning a verdict as to the guilt or innocence of these defendants as to the charge alleged in the indictment, and you have no concern and should not concern yourself or speculate as to what might

transpire thereafter, or what the effect of your verdict may be, whatever that verdict is.

I trust again that you will bear in mind that I am not indicating to you in any way what I think the verdict [10-41] should be or what I think your determination of any of the facts in the case should be. That is a matter that is entirely up to you. You should consider this case against each defendant so that you can return a verdict separately as to each defendant.

And that has concluded the instructions that I want to give to you, but before you finally get the case to consider it, it is necessary and required that I consult with counsel to see if there are other matters about which I should instruct you, and for that purpose I must consult with them. It may take a few minutes, it may be a very short time, it may take a little bit longer.

I will request the jurors to go back to the jury deliberation room but strange as it may seem I still request that you not discuss the facts of the case even now, because there may be something very important that I have omitted or overlooked.

The jury is excused to take a recess now in the jury deliberation room.

(The jury left the courtroom at 11:50 A.M.)

• • • •

[10-53] MR. CARROLL: Your Honor, may I enter another exception also to the underlying problem of the con- [10-54] spiracy and attempt, both being charged in the case.

My further objection is that because these two charges are joined in a single count that Your Honor's instructions have become extremely confusing in my opinion to the jury, so that I again ask for an election in this case for the reason that the joinder of those two charges in a single count tends to burden the jury with an excess of legal theory in order to come up with a verdict.

But, number 2—

THE COURT: I would think that it would help the defendants in that they have got to find both conspiracy and attempt.

MR. CARROLL: That was my second point. I understood Your Honor to take that position, that the jury must find as to each defendant both, assuming that there is to be a verdict of guilty, that he was, number 1, a member of a conspiracy, and that, number 2, he was guilty of an act constituting an attempt. But I didn't understand Your Honor to get that across to the jury clearly, that the analysis would be, number 1, was there a conspiracy, number 2, was this defendant a member of that conspiracy, and, number 3, did he commit an act constituting an attempt.

THE COURT: I am not saying that all defendants [10-55] to be guilty must personally have committed an act constituting an attempt.

MR. CARROLL: Even though the indictment alleges—

THE COURT: If they are members of the conspiracy and one of them committed an attempt then, as I see it under this indictment, they could all be found guilty.

MR. CARROLL: You mean on the theory of coconsiprators' liability?

THE COURT: Yes.

MR. CARROLL: I would except to that position, Your Honor.

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Title omitted in printing)

PETITION TO DISMISS INDICTMENT—DOUBLE JEOPARDY—
VIOLATION OF FIFTH AMENDMENT OF THE
U. S. CONSTITUTION

The Petitioner, LARRY STARKS, by and through his attorney, Jack E. Myers, Esquire, moves to dismiss the indictment on the grounds of double jeopardy and alleges as follows:

(1) The Petitioner, LARRY STARKS, was arrested on or about February 21, 1974, together with others. He was charged on the within indictment with a violation of Title 18, U.S.C. Sec. 1951.

(2) In one Count, he was charged with two substantive offenses, to wit: Conspiracy and Attempt to Obstruct, Delay and Affect Commerce by Extortion.

(3) Counsel objected to this indictment in that it was totally defective and legally incorrect.

(4) On June 4, 1974, the trial court entered an Order that the Government shall give a statement one week from June 4, 1974, whether the Government intended to proceed to prove either a conspiracy, or an attempt to obstruct, delay and affect commerce and the movement of articles and commodities therein by extortion or both.

(5) The Government elected to try *both* substantive charges in the one count over objection of counsel.

(6) The case was tried before the Hon. Judge Donald W. Van Artsdalen with a jury and Larry Starks was found guilty on July 1, 1974. He received a custodial sentence.

(7) An appeal was perfected to the Circuit Court of Appeals, matter reversed and remanded to the Lower Court.

(8) The verdict in this case has now placed the petitioner, Larry Starks, in jeopardy and such subsequent

prosecution is now barred by the constitutional protection against double jeopardy.

(9) The Petitioner was exposed to trial and verdict. He should not now be exposed a second time because:

(a) The prosecutor, the U. S. Government, was well aware of the defective indictment which was totally and legally incorrect.

(b) The Government intentionally resisted any attempt to have the indictment corrected, which would have been a simple matter to re-indict.

(c) The Petitioner was not responsible in any way in the manner in which the indictment was drawn and resisted being tried on such indictment.

(10) The duplicity of substantive offenses in one court is fatally defective to the Government case on retrial.

(11) The general verdict of guilty on the one count with two substantive charges:

(a) Does not reveal whether the jury found him not guilty of conspiracy and guilty of attempt to extort.

(b) Does not reveal whether the jury found him not guilty of attempt to extort and guilty of conspiracy.

(c) Does not disclose whether the jury was unanimous with respect to either count. (See page 4 of the Opinion of the Circuit Court of Appeals, which is attached hereto, made a part hereof and marked Exhibit "A"). Such a verdict was entered of record and did prejudice the petitioner in protecting himself against double jeopardy and in direct violation of the 5th Amendment to the U. S. Constitution.

(12) A shadow has now been cast over this one count indictment charging two substantive offenses which resulted in a verdict. A verdict as to what?

(a) The Government from the day of the indictment, pre-trial, trial and post trial has intentionally and deliberately resisted re-indictment.

(b) It was strongly urged by counsel that the Assistant U. S. Attorney, Kenneth Bravo, was proceeding illegally without foundation of law on this indictment.

(13) Petitioner, LARRY STARKS, should not be exposed a second time to trial of the same facts and issues already once raised.

(14) The conviction and/or acquittal under the first indictment and first trial is a bar to prosecution under the instant indictment which is the same as the first trial.

WHEREFORE, Petitioner, LARRY STARKS, respectfully requests the Bill of Indictment to be dismissed with prejudice because of double jeopardy and a violation of his constitutional rights under the 5th Amendment to the U. S. Constitution.

Respectfully submitted,

ZACK, MYERS AND ATKINSON

By: /s/ Jack M. Myers
JACK M. MYERS,
Attorney for Petitioner
LARRY STARKS

Filed June 5, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title omitted in printing)

MOTION TO DISMISS THE INDICTMENT AND
IN ARREST OF JUDGMENT

Defendant Donald Abney, by his attorney, Joel Harvey Slomsky, Esquire, respectfully requests your Honorable Court to dismiss the above-captioned indictment for the following reasons;

1. The above-captioned indictment fails to charge a violation of 18 U.S.C. Section 1951.

Respectfully Submitted

/s/ Joel Harvey Slomsky
JOEL HARVEY SLOMSKY
Attorney for Defendant,
Donald Abney

Filed August 13, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

MOTION TO DISMISS INDICTMENT

LARRY STARKS and ALONZO ROBINSON, defendants in the above action and movants herein, by their counsel, Ralph David Samuel and Thomas C. Carroll, hereby jointly move, pursuant to the Fifth and Sixth Amendments to the United States Constitution, F.R. Crim. P. 7 and 12, for an Order dismissing the above captioned indictment, and in support thereof assign the following reasons and grounds:

I. DOUBLE JEOPARDY

1. Trial of movants on the above captioned indictment will subject them to double jeopardy in violation of the Fifth Amendment to the United States Constitution.

II. INDICTMENT IS INSUFFICIENT UNDER F.R. CRIM.P. 7(c)(1)

2. That the indictment, following the "election" ordered by the United States Court of Appeals for the Third Circuit, is deficient with respect to constituting a "plain, concise and definite written statement of the essential facts constituting the offense charged", as required by F.R.Crim. P. 7(c)(1).

III. INDICTMENT DOES NOT CHARGE AN OFFENSE

3. That the indictment, following the election ordered by the United States Court of Appeals for the Third Circuit, does not charge an offense violating the laws of the United States.

4. Movants' memorandum of law is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ Ralph David Samuel
RALPH DAVID SAMUEL
Attorney for Larry Starks

/s/ Thomas C. Carroll
THOMAS C. CARROLL
Attorney for Alonzo Robinson

Filed August 28, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 74-133

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF HEARING
Philadelphia, Pennsylvania
September 2, 1975

Before HON. DONALD W. VAN ARTSDALEN, J.

(Appearances Omitted in Printing)

[2] THE COURT: The next case that we have to take up is the case of United States v. Starks, Robinson and Abney.

Gentlemen, as I understand it, there has been filed on behalf of all three of the defendants by their respective counsel motions to dismiss the indictment on the grounds of the insufficiency of the indictment, the failure of the indictment to charge a federal offense, and on the grounds that a retrial at this time of the indictment will constitute double jeopardy.

All of those motions are denied.

As I read and understand the decision of the Third Circuit Court of Appeals on this case when it came before the Third Circuit, it was remanded back to this Court with certain rather explicit suggestions and instructions, including strong suggestions as to the manner in which the jury should be selected, and as to certain evidence

that might or might not be properly admissible on a retrial.

It is to me inconceivable that the Court would have gone to these lengths if it had felt that a retrial would in any way constitute a violation of the double jeopardy prohibitions. And although the Court may not have directly ruled on the question of the sufficiency of the indictment as directed by the Third Circuit to be limited upon a retrial, I think that it would be entirely inappropriate, in view of that decision, for the District Court to grant the motion of the defendants.

Therefore, those motions to dismiss are denied.

[3] It is my understanding that where a motion to dismiss on the grounds of double jeopardy is raised that that matter may be appealed before there is a trial and before there is any conviction, at least that is my interpretation of the case of United States v. Disilvio, slip opinion of the Third Circuit of July 17, 1975, at page 2 Note 2(a), slip opinion No. 75-1083.

I know of no way, however, that the question of the sufficiency of the indictment itself or the failure to charge a federal crime may be determined by the Third Circuit Court of Appeals until and unless there is a judgment of conviction. However, that is a matter for the Third Circuit to decide.

There was a suggestion I believe made by counsel that in the event I should deny these motions that I could certify the case under 28 United States Code Section 1292(b).

It is my understanding of that particular section that certification may only be made in a civil case, and I know of no right, perhaps counsel knows of something that I am unaware of, that would give the right to certify a question of law as to the sufficiency of an indictment to the Third Circuit for determination in the absence of a judgment of conviction. And, therefore, I will make no certification.

I would hope that the Third Circuit might address itself to this problem, but that is a matter, as I say, entirely for the Third Circuit, over which I have no control.

May I ask counsel representing the defendants what, in [4] view of my rulings they propose to do.

As I understand it, the case has been listed for trial this morning. As I understand it, the Government is ready to proceed to trial.

MR. SLOMSKY: If Your Honor please, may we approach the Bench for one second?

THE COURT: You may.

(Side-bar conference off the record.)

MR. CARROLL: If Your Honor please, on behalf of Alonzo Robinson, it is my intention to file notice of appeal with the Circuit Court, to take advantage of the Desilvio doctrine which allows us to appeal immediately from Your Honor's determination of denying our motion for dismissal on double jeopardy ground.

In that connection, Your Honor, I woud move for a stay of the trial for not more than 10 days pending the filing of notice of appeal, and if the notice of appeal is filed within that 10-day period the trial of the case be stayed until the final disposition by the Circuit Court of that issue.

Secondly, Your Honor, I would move the Court to extend the appointment of the Defender Association under the Criminal Justice Act to this appeal.

Thank you, sir.

THE COURT: All right.

Do other counsel have any statements they wish to [5] make?

MR. SLOMSKY: If Your Honor please, I would join in the motion made by Mr. Carroll on behalf of his client. That is, we intend to appeal also the denial of the motions.

I think for the record I would just on behalf of Mr. Abney move to join in the motions filed by Mr. Carroll and Mr. Samuel on behalf of Larry Starks and Alonzo Robinson. I raise different grounds in my motion to dismiss the indictment than on the grounds that they raised.

I specifically join in their motions and intend to move to appeal Your Honor's denial of all the motions.

I would also ask for a stay and intend to file a notice of appeal within 10 days.

THE COURT: Mr. Samuel.

MR. SAMUEL: Your Honor, I would join in the motions made by Mr. Carroll.

Additionally, I would suggest that, I believe that the rules provide for my appointment by the Circuit Court to represent Mr. Starks for and during the appeal, and I believe that appointment is actually considered a separate appointment from the present appointment, and I would move for a continuation of the present appointment until the time as this matter gets before the Court.

THE COURT: Thank you.

Gentlemen, as you know, the defendants have a right to a speedy public trial. There was originally a trial, the matter [6] was appealed and it is now back on remand from the Third Circuit.

Obviously, if an appeal is taken and if the stay is granted as requested by counsel it will cause a further considerable delay.

Before granting even a temporary stay of this matter I will require that the defendants fully understand they are giving up their right to a speedy trial in this regard, and that they specifically waive that right.

I think that counsel perhaps should confer with their clients about the matter and I will then ask the three defendants to come up here to the front of the court and be sure that they understand the rights that they are waiving by asking or consenting to a stay.

Gentlemen, if you will come up here, please, all three of you.

(The three defendants stand at the Bar of the Court.)

THE COURT: Gentlemen, as I indicated, you have a right under the Constitution to a speedy public trial. There is no specific time set forth in the Constitution as to within what period of time or what number of days that must be done. However, it is obvious that if there is an appeal filed in this matter at this time claiming that to retry you would be a violation of the prohibition against a person being twice put in jeopardy, it will cause a considerable delay. I don't know how long it was the

last [7] time from the time of the appeal until the case was remanded by the Court, but undoubtedly you gentlemen will recall better than I. I think that it was approximately a year, but I may be in error on that.

In any event, an appeal will undoubtedly cause some further delay.

Now, Mr. Abney, do you fully understand what I am saying?

DEFENDANT ABNEY: Yes, sir.

THE COURT: And do you agree and do you go along with the request that your attorney made that the matter be stayed, the trial, the retrial of this case be stayed until such time as the appellate court decides the issue?

DEFENDANT ABNEY: Yes, sir.

THE COURT: And do you specifically waive any right to a speedy trial in this regard?

DEFENDANT ABNEY: Yes, sir.

THE COURT: Mr. Robinson, do you understand what I have been saying?

DEFENDANT ROBINSON: Yes, sir.

THE COURT: And do you specifically waive any right to a speedy trial so far as any delay that may be caused in the event an appeal is taken?

DEFENDANT ROBINSON: Yes, sir.

THE COURT: And do you agree that the case not be [8] tried until after a decision by the Third Circuit?

DEFENDANT ROBINSON: Yes, sir.

THE COURT: And Mr. Starks, do you understand what I have said?

DEFENDANT STARKS: Yes, sir.

THE COURT: And do you waive any right that you may have to a speedy public trial insofar as any delay may be caused in the event that an appeal is taken and the matter stayed or not tried until after the appeal is decided?

DEFENDANT STARK: Yes, sir.

THE COURT: All right, gentlemen, you may step back.

Does the Government have any position it wants to take in this matter?

MR. BRAVO: No, Your Honor. I think the Court is correct. According to the Desilvio case the matter is appealable.

If there is anything any one of us has to say at this time it would be in a brief to the Court of Appeals.

THE COURT: As I have indicated—I don't know that I have to indicate it, but were this a matter that came before me initially in the first instance, I think that I might be inclined, I certainly would give very serious consideration to the possible claim of double jeopardy, but as I read the opinion of the appellate court in this case when it was up before it before, certainly it was anticipated that the District Court would retry the defendants and, therefore, I feel that I have no basis for [9] acting upon the motion beyond what I have done of denying the motions, and this applies to all motions pending to dismiss.

Gentlemen, is there any reason why you cannot file your application for appeal within a week?

MR. SLOMSKY: No, sir.

MR. CARROLL: No, sir.

THE COURT: We will stay the trial of this case for a period of one week pending defendants filing an appeal with the Third Circuit Court of Appeals.

In the event that an appeal is filed within one week the case will be stayed until a decision by the Third Circuit Court of Appeals, immediately after which a time for trial will be set in the event that the Circuit Court denies the appeal, denies it in a sense of denying the respective motions of the defendants.

The appointments heretofore made under the Criminal Justice Act of both the Public Defender and of Mr. Samuel to represent two of the defendants insofar as I have authorization to do so is continued, and they will continue to represent the defendants in this matter.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-2071/73

UNITED STATES OF AMERICA

v.

LARRY STARKS
CLARENCE LOUIS STARKS
JAMES TAYLOR, a/k/a LONZO HOWARD ROBINSON;
ALONZO ROBINSON
DONALD EVERETT ABNEY
MERRILL ALBERT FERGUSON

DONALD ABNEY, *Appellant* in No. 75-2071,
LARRY STARKS, *Appellant* in No. 75-2072,
ALONZO ROBINSON, *Appellant* in No. 75-2073.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 74-133)

Submitted Under Third Circuit Rule 12(6)
February 9, 1976

Before: ALDISERT, GIBBONS and ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit, (1) that retrial is barred by the double jeopardy clause where the general verdict of guilty on a duplicitous indictment fails to disclose whether the jury found each defendant guilty of one crime or both; and (2) where the government elects to proceed to trial on the bare allegation of conspiracy the indictment fails to charge an offense; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN, Clerk

DATED: Feb. 10, 1976

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-2071/2073

UNITED STATES OF AMERICA

v.

LARRY STARKS
CLARENCE LOUIS STARKS
JAMES TAYLOR, a/k/a LONZO HOWARD ROBINSON;
ALONZO ROBINSON
DONALD EVERETT ABNEY
MERRILL ALBERT FERGUSON

DONALD ABNEY, *Appellant* in No. 75-2071
LARRY STARKS, *Appellant* in No. 75-2072
ALONZO ROBINSON, *Appellant* in No. 75-2073

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: March 5, 1976

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6521

DONALD ABNEY, LARRY STARKS *and* ALONZO ROBINSON,
PETITIONERS

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 14, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 217359 293

No. 75-6521

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

DONALD ABNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SHIRLEY BACCUS-LOBEL,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6521

DONALD ABNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORAMDUM FOR THE UNITED STATES

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A4) is unreported. An earlier opinion of the court of appeals is reported at 515 F.2d 112. The oral opinion of the district court (Pet. App. A2-A3) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4) was entered on February 10, 1976. A petition for rehearing was denied on March 5, 1976 (Pet. App. A5). The petition for a writ of certiorari was filed on Monday, April 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. a. Whether a pretrial order declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

b. If so, whether the court of appeals has jurisdiction to consider a non-double-jeopardy claim presented pendent to that appeal.

2. Whether the Double Jeopardy Clause bars retrial after petitioners' convictions were reversed, at their behest, because the indictment was duplicitous.

3. Whether the pending indictment fails to state an offense.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on a one-count indictment charging them with attempting to obstruct commerce by extortion, in violation of 18 U.S.C. 1951, and with conspiring to do the same. The court of appeals reversed their convictions and remanded for a new trial (United States v. Starks, 515 F.2d 112). Reversal was required, the court held, because an improperly authenticated tape recording had been admitted in evidence (515 F.2d at 118-124). The court also indicated that the indictment was duplicitous. Without reaching the question whether the district court's instructions to the jury prevented any prejudice, the court held that on retrial the government would be required to elect between the conspiracy and attempt charges (id. at 118).

At a pretrial conference the prosecutor expressed his intention to proceed on the conspiracy charge. Petitioners then moved to dismiss the indictment, contending (1) that retrial would violate the Double Jeopardy Clause, and (2) that the indictment, as modified by the election to proceed on the conspiracy charge only, fails to charge an offense. The motions were denied by the district court, and petitioners

appealed. The government, observing that United States v. DiSilvio, 520 F.2d 248, 248, n. 2a (C.A. 3), had held that the pretrial denial of a motion to dismiss an indictment on double jeopardy grounds is immediately appealable, asked the court of appeals to overrule DiSilvio and dismiss the appeal. It asked the court in any event to dismiss the appeal to the extent that it challenged the sufficiency of the indictment. The court of appeals ordered the case to be submitted on briefs without oral argument. It affirmed by judgment order, rejecting on the merits both of petitioners' arguments.

ARGUMENT

1. Here, as in Barket v. United States, No. 75-1280, the court of appeals permitted an immediate appeal from an interlocutory pretrial order rejecting a double jeopardy claim. What is more, the court of appeals in this case implicitly sanctioned immediate appeal from the pretrial denial of a claim that the indictment fails to charge an offense, at least where such a claim is presented together with a double jeopardy claim.

We have urged the Court to grant the petition in Barket.[1/] This case is slightly different from Barket, however. Here, as in Barket, the defendants joined other issues with their double jeopardy claim on appeal. In Barket the court of appeals, while asserting jurisdiction over the double jeopardy claim, declined to entertain the other claims presented; here the court of appeals entertained both the double jeopardy claim and the assault upon the sufficiency of the indictment. This case therefore presents the additional question whether, assuming that the court of appeals had jurisdiction over the

1/ A copy of our memorandum in Barket has been furnished to petitioners' counsel.

double jeopardy claim, it was empowered to resolve the challenge to the sufficiency of the indictment.[2/] The Court accordingly may wish to consider granting the petition and setting it for argument in tandem with Barket.[3/]

2. Petitioners' double jeopardy claim rests on the premise that because the indictment is duplicitous their original conviction may have related to only one of the offenses. It is therefore theoretically possible, they contend, that the first jury believed them innocent of conspiracy, the charge upon which the prosecutor proposes to proceed. Thus, the argument concludes, to try petitioners again may be to try them on a charge of which they have been acquitted implicitly by the first jury.

The short answer to this is that their original convictions were reversed on appeal and remanded for a new trial at petitioners' behest. This precludes a double jeopardy challenge to retrial. United States v. Ball, 163 U.S. 662; Green v. United States, 355 U.S. 184, 189. Cf. Foreman v. United States, 361 U.S. 416, 425-426; Sapir v. United States, 348 U.S. 373.

What is more, the foundation of petitioners' argument -- that the jury implicitly may have convicted them of one offense and acquitted them of the other -- is not supported by the jury's verdict (an unqualified verdict of guilty) or by the opinion of the court of appeals when the case was first before

2/ In our view, both of petitioners' claims are insubstantial. But under the approach of the court of appeals there is no impediment to joining a complex and close claim of any sort to an insubstantial double jeopardy argument. Joinder of this sort would enable defendants to obtain pretrial review of almost all claims, and the potential for delay in criminal cases would be considerable.

3/ The Court also may wish to consider granting only this petition and holding Barket pending its decision in this case.

it. The court declined to decide whether the instructions to the jury were sufficient to prevent this sort of outcome. We submit that the instructions to the jury were sufficient. The court instructed the jury five times[4/] that all elements of both offenses must be proved beyond a reasonable doubt to support a conviction. Petitioners' claim that the court's instructions in this regard were contradicted by other instructions is not supported by a reading of the entire charge. There is simply no basis for concluding that petitioners were previously acquitted of the conspiracy charge.

3. Petitioners' contention that the indictment fails to state an offense because it does not allege that the defendants conspired "together" or formed a particular agreement (Pet. 7-9) is insubstantial. An indictment "is not to be construed in a technical manner but rather according to common sense." United States v. Pleasant, 469 F.2d 1121, 1125 (C.A. 8). See generally Hamling v. United States, 418 U.S. 87, 117-119. The indictment, with the attempt charge disregarded, charges that petitioners did "conspire * * * to obstruct * * * commerce * * * by extortion * * * by * * * attempting to obtain * * * money [from the victim] * * *, the attempted obtaining of said [money] * * * being * * * intended to be accomplished with the consent of [the victim] induced and obtained by the wrongful use * * * of actual and threatened force, violence and fear * * *" (see Pet. App. C). A common sense construction necessarily leads to the conclusion that petitioners are charged with having conspired with each other, not each separately with a different unnamed person or persons.

4/ Four times in the original instructions (Tr. 10-25, 10-26, 10-33, 10-35) and once in the supplementary instructions (Tr. 10-60).

CONCLUSION

We do not oppose the petition for a writ of certiorari in view of the importance of the threshold issue of the jurisdiction of the court of appeals.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SHIRLEY BACCUS-LOBEL,
MARSHALL TAMOR GOLDING,
Attorneys.

MAY 1976.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and ALONZO ROBINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

RALPH DAVID SAMUEL, ESQUIRE
4013 Chestnut Street
Philadelphia, Pa. 19104
215–EV7-5535

Attorney for Larry Starks

THOMAS C. CARROLL, ESQUIRE
MARK D. SCHAFFER, ESQUIRE
Defender Association of Phila.
Federal Court Division
Room 904, 21 South 12th Street
Philadelphia, Pa. 19107
215–568-5200

Attorneys for Alonzo Robinson

JOEL HARVEY SLOMSKY, ESQUIRE
2616 Girard Plaza
Philadelphia, Pa. 19102
215–L08-6188

Attorney for Donald Abney

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

I.

OPINIONS OF COURTS BELOW

The September 2, 1975 oral opinion and order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, J.) in Criminal Number 74-133 dismissing petitioners' motions to dismiss on double jeopardy grounds is attached hereto. Appendix p. 44. The Judgment Order of the United States Court

of Appeals for the Third Circuit under Numbers 75-2071, 2072 and 2073 affirming the order of the District Court is attached hereto. Appendix p. 50. The Court of Appeals' denial of Petition For Rehearing is attached hereto. Appendix p. 52. An earlier opinion of the Court of Appeals reversing judgment of conviction after direct appeal is reported *sub nom. United States v. Starks, et al.*, 515 F.2d 112 (3d Cir. 1975).

II.

STATEMENT OF JURISDICTION

The judgment order of the Court of Appeals affirming the District Court was entered on February 10, 1976. A timely Petition for Rehearing was denied on March 5, 1976. On March 16, 1976, the Court of Appeals stayed the issuance of the mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, to April 4, 1976 pending the filing of the present Petition For Writ of Certiorari which was granted by this Court on June 14, 1976.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under the doctrine of *United States v. DiSilvio*, 520 F.2d 247 (3d Cir. 1975).

III.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE HOBBS ACT, 18 U.S.C.A. §1951

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

FEDERAL RULE OF CRIMINAL PROCEDURE RULE 12(b)(2)

Objections that the indictment "... fails to show jurisdiction in the court or to charge an offense ... shall be noticed by the court at any time during the pendency of the proceedings."

IV.

QUESTIONS PRESENTED FOR REVIEW

1. Whether retrial of petitioners is barred by the double jeopardy clause of the Fifth Amendment where a general verdict of guilty on a duplicitous indictment fails to disclose whether the jury found each defendant guilty of one crime or both?

2. Whether the indictment fails to charge an offense?

V.

STATEMENT OF THE CASE

On March 14, 1974, petitioners herein were first charged in a duplicitous one count indictment (Appendix p. 5) with conspiracy and attempt to violate the Hobbs Act, 18 U.S.C. §1951; they were found guilty in a general verdict, and took a direct appeal. Judgment of conviction was reversed and the case remanded to the district court. *United States v. Starks et al.*, 515 F.2d 112 (3d Cir. 1975). In its opinion, the Court of Appeals found that the indictment was duplicitous. 515 F.2d at 116.

The Court of Appeals ordered the government to make an election prior to a retrial as to which of the two crimes charged in the single count indictment it would proceed on. During a pre-trial conference on August 22, 1975, the government expressed its intention to proceed on the conspiracy offense.

In the District Court petitioners filed a Motion To Dismiss on the basis that a second trial on this indictment, even following the government's election,

will subject them to double jeopardy in violation of their rights under the Fifth Amendment to the United States Constitution. In their motions, petitioners also argued that even after an election to proceed on the conspiracy allegation, the indictment is fatally defective for failure to sufficiently charge a crime under the laws of the United States.

On September 2, 1975, the District Court denied petitioners' motion;[1] this order was in turn affirmed by

[1] After this case was remanded by the Third Circuit for a new trial, petitioners filed in the district court a Motion to Dismiss the Indictment alleging a violation of double jeopardy stemming from its duplicity and another Motion to Dismiss based upon the failure of the indictment to charge a crime under the laws of the United States. Although the district court stated: "I would certainly give very serious consideration to the possible claim of double jeopardy," (Transcript of September 2, 1975 at p. 8, Appendix p. 44), the judge felt that in view of the remand by the Circuit for a new trial, he could not simply dismiss the indictment.

Accordingly, the district court specifically stayed the trial and permitted petitioners to appeal, (D.C. Docket Entries, No. 167), under the doctrine of *United States v. DiSilvio*, 520 F.2d 247, 248, n.2(a) (3d Cir. 1975), holding that the denial of a motion to dismiss the indictment on a double jeopardy grounds is a final and appealable order under 28 U.S.C. Section 1291, see *Cohen v. Beneficial Industrial Loan Corporation*, 377 U.S. 541 (1949); *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972). The government did not object to the stay nor the appeal. The Judge asked the prosecutor for his position and he stated he had none and further said: "I think the court is correct. According to the DiSilvio case the matter is appealable. If there is anything anyone of us would have to say at this time it would be in a brief to the Court of Appeals." (TR, Hearing 9-2-75, p. 8, Appendix p. 49). In the absence of the stay, a trial would have begun forthwith.

Thereafter, the appeal was filed and petitioners raised therein not only the double jeopardy issue but also the claim that the

(continued)

the Court of Appeals. Review is sought herein of this affirmance by the Court of Appeals. All proceedings concerning the retrial of petitioners in the District Court have been stayed pending the filing and disposition of this Petition for Certiorari.

V.

ARGUMENT

A. Retrial of Petitioners Is Barred by the Double Jeopardy Clause of the Fifth Amendment Where a General Verdict of Guilty On A Duplicitous Indictment Fails to Disclose Whether the Jury Found Each Defendant Guilty of One Crime or Both.

The Court of Appeals found the "singularly inartistic indictment" in this case to be duplicitous as it charges

(footnote continued from preceding page)

indictment was insufficient to charge a Federal offense. This procedure was utilized because the Third Circuit held in *United States v. Beard*, 414 F.2d 1014 (3d Cir. 1969) and *United States v. Manuszak*, 234 F.2d 421, 423 (3d Cir. 1956) that a challenge to the sufficiency of an indictment for failure to allege an offense may be raised for the first time on appeal. See also F. R. Crim. P. Rule 12(b)(2), which provides that the failure of an indictment ot charge an offense shall be noticed by the court at any time during the pendency of the proceedings.

For the first time on appeal the government took the position that the denial of the motion to dismiss on double jeopardy grounds was not appealable prior to trial and that the Court of Appeals had no jurisdiction to consider the claim that the indictment fails to charge an offense. The government's request that the Third Circuit overrule *Desilvio* was implicitly rejected by the Court of Appeals.

two offenses – conspiracy and attempt – in one count. *United States v. Starks, et al., supra.* at 115, 116.

Counsel for petitioners repeatedly requested, both early in the proceedings and during the course of the trial that the government make an election. Transcript (hereinafter TR.), 6-14-74 Conference in Chambers, pp. 37-39, Appendix p. 7; TR., Trial, pp. 8-146, 147, Appendix p. 9; TR., Trial, pp. 10-54, 55, Appendix p. 36. Nevertheless the government steadfastly refused to do so, choosing instead to proceed through trial and on appeal on the incorrect theory that a valid judgment of conviction could be imposed on the duplicitous indictment. *Starks, supra.* at 117 fn. 9.

The Court of Appeals reversed the conviction on other grounds and remanded for a new trial, choosing not to dwell on the impact of the duplicitous indictment on petitioners' constitutional rights.

Nevertheless, petitioners contend the Court of Appeals' order for a new trial with a requirement that the government make an election, fails to vitiate the harm inherent in being tried not only once, but also potentially a second time under the instant indictment.

Proceedings under this duplicitous indictment subject petitioners to double jeopardy in two ways: First, by its nature a duplicitous indictment violates the double jeopardy clause of the Fifth Amendment to the United States Constitution and accordingly given the government's overreaching in refusing to make an election prior to the first trial, the indictment should have been dismissed. Secondly, since the petitioners have stood trial once on a duplicitous indictment, a second trial – even after an election by the government – will impermissibly once again expose petitioners to jeopardy for charges of which arguably they were acquitted during the first trial.

Most importantly, the overall effect of the government's action in drafting this duplicitous indictment and forcing petitioners to stand trial on it has created an environment for the case in which any further attempt by the government to try these petitioners on this indictment is barred by the Fifth Amendment.

1. A Duplicitous Indictment by its Nature Violates the Double Jeopardy Clause.

This Court has on numerous occasions set forth the reasons for the requirement that an indictment must be clear and concise. One of the most important among these is: "... 'in case any other proceedings are taken against [the defendant] for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen v. United States*, 161 U.S. 29, 34." *Hagner v. United States*, 285 U.S. 427, 431 (1932) cited at *Russell v. United States*, 369 U.S. 749, 763, 764 (1962).

Furthermore, "the prohibition against duplicity is designed to protect a defendant's rights under the sixth amendment ... and to guard against the possibility that 'confusion as to the basis of the verdict may subject the defendant to double jeopardy in the event of a subsequent prosecution' (citation omitted)." *United States v. Tanner*, 471 F.2d 128, 139 (7th Cir. 1972).

A duplicitous indictment fails to meet the due process requirements of Rule 7(c) F.R. Crim. P. that it be clear and concise, and violates by its nature the Fifth Amendment prohibition against double jeopardy. *United States v. Heinze*, 361 F. Supp. 46, 56 (D.C. Del. 1973).

2. Retrial is Not Permitted Where Defendants Have Been Subjected to Double Jeopardy by Prosecutorial Overreaching.

Where prosecutorial overreaching causes reversal of a conviction or the termination of a trial after defendants have revealed their defense, a retrial is barred by the double jeopardy clause. *Downum v. United States*, 372 U.S. 734 (1963).

The rationale for this rule is that retrial under such circumstances permits an ill-prepared or incompetent prosecutor the opportunity to retrench and prepare new evidence for pleadings after having learned the defense. The same rationale applies to the instant case and permits petitioners to raise the Fifth Amendment double jeopardy claim at this point despite their having won a reversal of their first conviction on appeal.

The first trial proceeded for the duration of ten days at great expense for both the government and petitioners despite defense counsels' repeated request that the government make an election on the indictment which both defense and the trial court clearly understood was duplicitous. *Starks, supra.* at 116, 117. The government's refusal to elect must be seen as overreaching of the sort which bars retrial.

3. The Trial Court's Charge Failed to Correct the Constitutional Infirmity of the Duplicitous Indictment.

The dangers of permitting trials on duplicitous indictments are nowhere better illustrated than in the instant case. Following a ten day trial all three petitioners were "convicted" of two separate offenses joined in a single duplicitous indictment.

However, beside the fact of their "conviction," there is no way for each petitioner to know of what offense he individually was convicted or conversely of what offense he may have been acquitted.

While the trial court conscientiously sought to charge the jury so as to eliminate the problems associated with a duplicitous indictment, it was a virtual impossibility. Petitioners are now faced with retrial after "a general verdict of guilty [which] does not disclose whether the jury found [them] guilty of one crime or both." *Starks, supra.* at 116. (The charge of the trial court is set forth in full in the Appendix at page 11.)

The District Court Charged the jury as follows:

> "Therefore, I shall define to you all of the requisites of both conspiracy and an attempt, because all of these requisites must be found before the jury could find any defendant guilty." TR, Trial p. 10-26. (Appendix p. 26).

The District Court then went on to define conspiracy, carefully explaining that a conspiracy could include one or more of the petitioners. TR., Trial page 10-27 (Appendix p. 27).

Thereafter the District Court briefly charged the jury on the elements of attempt. TR., Trial page 10-35 (Appendix p. 32). The Court suggested that any or all of the petitioners could be found guilty of attempt, TR., Trial page 10-38 (Appendix p. 34), and that an attempt by one or more could constitute the overt act of conspiracy. TR., Trial page 10-35 (Appendix p. 32).

In objecting to the charge, Mr. Carroll, counsel for petitioner Robinson, suggested to the Court that it had not clearly charged the jury that before any petitioner could be found guilty the jury must find:

"... number 1, was there a conspiracy, number 2, was this defendant a member of the conspiracy, and, number 3, did he commit an act constituting attempt." Tr. page 10-54 (Appendix p. 36)

The Court responded, *inter alia*:

"If they are members of the conspiracy and one of them committed an attempt, then as I see it under this indictment, they could all be found guilty." Tr. page 10-55. (Appendix p. 37). See *Pinkerton v. United States*, 328 U.S. 640 (1946)

This colloquy demonstrates the confusing nature of this duplicitous indictment. While the Court initially charged that a petitioner must be found guilty of both conspiracy *and* attempt to be found guilty, the remainder of the charge and the express understanding of the Court was to the contrary.

Since two of the original five defendants were acquitted, the jury obviously understood that it could find some defendants guilty of less than all of the crimes charged. The key question, one which is not susceptable to an answer in the absence of pure speculation, is whether or not the jury found some of the remaining petitioners guilty of less than all the crimes charged.

Given the confusing nature of the indictment and charge, the permutations of the possible bases for the verdict are numerous. In light of the trial court's understanding, each petitioner might have been found guilty of the conspiracy without being found guilty of attempt. Moreover, any of the three petitioners might have been excluded from the conspiracy, but found guilty of attempt. The existence of this question creates a distinct possibility that retrial, even on conspiracy alone, will subject them to double jeopardy. As the court below recognized:

"... a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both...." 515 F.2d 112 at 116.

Thus, petitioners are faced with "having to 'run the gantlet' a second time," *Ashe v. Swenson*, 397 U.S. 436, 446 (1970), without the benefit of a clear verdict on the first trial.

If the indictment had been properly drafted with two counts and the jury had found petitioners guilty of one of the two counts, petitioners could not be retried on the other count, even following a successful appeal of the count on which they were found guilty. This would be true even if the jury were silent as to the remaining count. *Green v. United States*, 355 U.S. 184 (1957).

In light of the general verdict of guilty in the first trial, the Fifth Amendment double jeopardy clause should protect petitioners from having to stand trial again for an offense their guilt of which can be ascertained only by sheer speculation.

4. The Sound Administration of Justice Bars Retrial in This Case.

The instant case presents an exception to the rule of *United States v. Ball*, 163 U.S. 662 (1896) that retrial is permitted after defendant's successful appeal. This Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969) characterized as "unmitigated fiction: in certain circumstances the premise that a retrial after a reversal on appeal is permitted because "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U.S. 711, 721. In the instant case, because of this prosecutorial overreaching, that

premise is wholly inapposite and must likewise be viewed as "unmitigated fiction."

This Court recognized that principles supporting the "sound administration of justice" should be given greater weight than "conceptual abstractions" in deciding whether or not after a reversal a second trial should be barred by the double jeopardy clause of the Fifth Amendment. *United States v. Tateo*, 377 U.S. 463, 466 (1964).

In the instant case the prosecutor insisted on carrying the trial through to its conclusion despite the obvious duplicitous nature of the indictment. To permit retrial now will encourage prosecutors to insist on such flawed trials in the future knowing that reversal will simply provide a second opportunity to require defendants to twice "run the gantlet" at great cost to the public. Accordingly, the sound administration of justice requires that a second trial now be barred.

B. The Indictment Fails to Charge A Federal Offense.

1. The Hobbs Act Does Not Proscribe a Conspiracy to Commit Attempted Extortion.

It is axiomatic that every essential element of an offense must be charged. *United States v. Debrow*, 346 U.S. 374, 376 (1953). Concomitantly, an indictment cannot charge as an offense something which was not created by an Act of the legislature. There is no federal common law and there are no federal criminal offenses except those specifically created or enacted by the Congress of the United States, 16 Am. Jur. 2d,

Conspiracy, Section 2; *State v. Wheeling Bridge Co.*, 13 How. 518, 563 (U.S. 1851); *United States v. Hudson*, 7 Cranch 32, 34 (U.S. 1812).

In the instant case, even considering the fact that the government has elected to proceed on "conspiracy," the indictment still fails to charge a violation of 18 U.S.C. Section 1951. The "singularly inartistic" indictment, with the attempt charge disregarded, charges that petitioners did:

> "conspire... to obstruct... commerce... by extortion... by... *attempting* to obtain... money (from the victim)..., the *attempted* obtaining of said (money)...being... intended to be accomplished with the consent of (the victim) induced and obtained by the wrongful use...of actual and threatened force, violence and fear...". (Memorandum of United States at 5)

Accordingly, the indictment now charges petitioners with *"conspiring"* to obstruct commerce by *attempted* extortion, as opposed to the completed act of extortion itself, which is defined in subsection (b)(2), a permissible object of the conspiracy offense referred to in Section 1951.

The Hobbs Act, *supra*, provides in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in this section shall be fined... or imprisoned, or both...
>
> (b)(2) The term "extortion" means the obtaining of property from another, with his consent, induced by the wrongful use of actual or

threatened force, violence or fear, or under color of official right.

Although this act is not a model of clarity, petitioners agree with Judge Gibbons' analysis of what the Hobbs Act in part prohibits:

> "The Hobbs Act proscribes a number of separate offenses: (1) robbery; (2) extortion; (3) attempted robbery or extortion; and (4) conspiracy to commit robbery and extortion. Each such offense also requires the Federal jurisdictional element of obstruction, delay, or effect on interstate commerce. . ." *Starks, supra*, at 116. (Footnote Omitted).[2]

A fair reading of the text of Section 1951 is that the words "so to do" appearing after the antecedent "conspires" apply also to the phrase "attempts." In other words, in recognizing that "conspiracy" and "attempt" are two spearate and distinct offenses, Congress intended to proscribe an *attempt* to rob or extort in addition to and as compared to a *conspiracy* to rob and extort.[3] The phrase extortion is defined in

[2] Incredibly enough, the inartfully drafted indictment here seems to charge the conspiracy was to obstruct the federal jurisdictional element rather than being a conspiracy to commit extortion which affected interstate commerce.

[3] "Conspiracy" and "attempt" have long been denominated as distinct inchoate offenses to distinguish them from the substantive offense that is the object of the activity encompassed by inchoate crimes. *E.g., Final Report of The Commission on Reform of Federal Criminal Laws*, 74 (1971). (The Commission states that "the various forms of *inchoacy* dealt with in this Chapter are not to be cumulated. . .") *Model Penal Code*, Tentative Draft No. 10 (1962) (dealing with the complementary inchoate crimes of conspiracy, attempt and solicitation). Moreover, in view of the use of the word "attempt" in Section 1951 and in the absence of a general Federal "attempt" statute, the phrases "attempting" and "attempted" in the indictment should not be equated with the same words commonly used in everyday conversation.

subsection (b)(2) without any reference to the inchoate offense of "attempt".

The legislative history of Section 1951 not only supports petitioners' position that attempted extortion was not intended to be the subject of a Hobbs Act conspiracy charge, but also clarifies the surface ambiguities in the text. The present version of Section 1951 was codified as part of the 1948 revision of Title 18, United States Code. Prior to 1948 revision, the Hobbs Act, including amendments added in 1946, read in pertinent part as follows, see *Callanan v. United States*, 364 U.S. 587, 588, n.1 (1961):

> "Sec.2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or *extortion*, shall be guilty of a felony.
>
> Sec.3. Whoever *conspires* with another or with others, or acts in concert with another or with others to do anything in violation of Section 2 shall be guilty of a felony.
>
> Sec.4. Whoever *attempts or participates in an attempt* to do anything in violation of Section 2 shall be guilty of a felony."
> (emphasis added)

Under this language it is clear that since Section (3) three refers back only to Section (2) two, Congress did not intend that *attempted* extortion could be the object of the conspiracy charge in Section (3) three. The "attempt" and "conspiracy" offenses are obviously treated separately. When the present or 1948 version of the Hobbs Act was enacted, the words "attempts or conspires so to do" were substituted for sections 3 and 4 of the 1946 Act. There was no intention to change the common understanding of these two offenses

previously created in the Hobbs Act. No mention is made in the legislative history that now "attempted" extortion could be an object of the conspiracy charge. The conspiracy section was designed to prohibit a conspiracy to commit any of the designated *substantive* violations. See *Callanan, supra* at 590, 591, notes 4 and 5.

Had Congress intended that "attempted" extortion could be the object of "conspiracy," it would have done so with language having far more clarity.[4] For example, Section 503 of the Model Penal Code, defining "Criminal Conspiracy," does so with the following exactitude:

> (1) Definition of Conspiracy. A person is guilty of *conspiracy* with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in

[4] The only case holding that "attempted" extortion could be the object of conspiracy is *United States v. Jacobs*, 451 F.2d 530, 534 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), where the court said in *dicta*:

> "it will be observed that Section 1951, *supra*, defines three offenses where robbery is not involved, namely, extortion, attempted extortion, and conspiracy to commit extortion or attempted extortion, which obstruct, delay, or affect interstate commerce." (Footnote omitted) 451 F.2d at 534.

This interpretation of the Hobbs Act was made without analysis of the legislative history or the language of the text. In *Starks, supra*, at page 116, Judge Gibbons' discussion of what the Hobbs Act proscribes noticeably omits conspiracy to commit *attempted* extortion.

> conduct which constitutes such crime or an *attempt* or solicitation to commit such a crime; or
>
> (b) agrees to aid such other person or persons in planning or commission of such crime or of an *attempt* or solicitation to commit such crime." (Emphasis added)

Under the circumstances here, the ambiguity apparent on the face of the Hobbs Act should be resolved in favor of lenity and any doubts resolved in favor of petitioners. *United States v. Bass*, 404 U.S. 336, 347, 348 (1971).

2. The Indictment Fails to Allege the Essence of Conspiracy: An Agreement to Commit an Offense.

The indictment also fails to charge an offense because it falls short of the minimum required standards for charging any conspiracy.

The special nature of the conspiracy offense in which defendants are not being tried for the relatively objective behavior of committing a crime, but rather for the relatively illusory behavior of planning a crime, requires that an indictment be drawn to specific guidelines. *United States v. Britton*, 108 U.S. 199 (1883); *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915). In conspiracy indictments, the risk to an accused of prejudice is too great to permit the "common sense" interpretation of vague and inspecific language which the government urges in the instant case.

However, even if this court were to adopt the government's attempt to read the indictment in a

"common sense" fashion, it would still be legally insufficient to charge a crime. In its brief in the Third Circuit Court of Appeals, the government's "Common sense" construction of the indictment reads:

> "[The defendants did] conspire... to obstruct... commerce... by extortion... by... attempting to obtain... money...", etc. (Brief of the United States p. 22).

Nowhere does there appear the foremost essential element of a conspiracy indictment: "an agreement".[5]

The essence of conspiracy lies in the agreement. "That agreement must be distinctly and directly alleged. Inference and implication will not, on demurrer, suffice. Aid cannot be sought in the allegations of what was done in pursuance of it...What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven." *Hamner v. United States*, 134 F.2d 592, 595 (5th Cir. 1943).

[5]See *United States v. Mathies*, 203 F. Supp. 797 (W.D. Pa. 1962) where the court reviewed cases dealing with the sufficiency of conspiracy indictments and concluded, "Those decisions also stated that there are three essentials in a conspiracy indictment: the agreement, the offense – object toward which the agreement is directed, and an overt act." 203 F. Supp. at 801.

VII.

CONCLUSION

Petitioners respectfully request that your Honorable Court reverse the Judgment Order of the Court of Appeals for the Third Circuit and remand the case with instructions to dismiss the indictment.

Respectfully submitted,

/s/ Ralph David Samuel
RALPH DAVID SAMUEL

/s/ Thomas C. Carroll
THOMAS C. CARROLL

/s/ Joel Harvey Slomsky
JOEL HARVEY SLOMSKY

No. 75-6521

In the Supreme Court of the United States

OCTOBER TERM, 1976

DONALD ABNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

SHIRLEY BACCUS-LOBEL,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Cases—continued:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75–6521

DONALD ABNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The court of appeals rendered no opinion. An earlier opinion of the court of appeals is reported at 515 F. 2d 112. The oral opinion of the district court (A. 44–49) is unreported.

JURISDICTION

The judgment of the court of appeals (A. 50–51) was entered on February 10, 1976. A petition for rehearing was denied on March 5, 1976 (A. 52). The petition for a writ of certiorari was filed on April 5, 1976, and was granted on June 14, 1976 (A. 53). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. a. Whether a pretrial order denying a motion to

dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

b. If so, whether a court of appeals has jurisdiction to consider other claims presented pendent to that appeal.

2. Whether the Double Jeopardy Clause bars a retrial following reversal of petitioners' convictions at their behest because they had been tried on a duplicitous indictment.

3. Whether the pending indictment charges an offense.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

18 U.S.C. 1951 is set out at Pet. Br. 3–4.

STATEMENT

1. On March 14, 1974, a one-count indictment returned in the United States District Court for the Eastern District of Pennsylvania charged petitioners, along with Clarence Starks and Merrill Ferguson, with conspiracy and attempt to obstruct interstate commerce by extortion, in volation of 18 U.S.C. 1951.

The prosecution's case at trial, which is fairly summarized in the opinion of the court of appeals on the

first appeal in this case, was based upon the testimony of Ulysses J. Rice, the victim of the conspiracy. Rice owned "Nookie's Tavern," a bar in Philadelphia that sold liquor distilled and bottled outside the State (2B Tr. 3, 51–52, 56, 61, 64).[1] Rice testified that on several occasions in December 1973 petitioner Robinson, a Black Muslim, had visited his tavern and offered to sell him the Muslim newspaper and food items. He testified that on December 8 Robinson and Ferguson entered the tavern and demanded that Rice give them $200 in honor of "Founder's Day," a Muslim holiday. Robinson and Ferguson collected the $200 from Rice three days later when they returned to the tavern accompanied by petitioner Abney (2B Tr. 5–14).

Petitioners Robinson and Abney returned to the tavern the following week and demanded that Rice pay them $200 weekly. They told Rice that if he was able to pay "taxes to the white man and to the Government," he could pay "taxes" to them (2B Tr. 19–20). Rice protested, but was told to pay if he "knew what was good for [him]" (2B Tr. 21). As Robinson and Abney were leaving, Abney told Rice: "Don't give us no trouble because you know what will happen to you" (2B Tr. 22).

The next evening petitioner Starks approached Rice at a movie theater; he told him that "they had had a meeting" about him, that Rice was to have been required to pay $1500, but that Starks had managed to reduce the payment to $500. After this incident Rice

---

[1] Transcript references are designated by day of trial, section, and page number. Thus "2B Tr. 3" refers to page 3 of section B of the transcript of the second day of trial.

concluded that his life was in jeopardy; he therefore did not return to the tavern for approximately two months. He had no contact with petitioners during this period, although they regularly sought him at the tavern (2B Tr. 25–28, 51; 5B Tr. 616–619).

By February 19, 1974, Rice had returned to the tavern. On that day petitioner Starks visited him and demanded $500. Starks told Rice that he could no longer hide, that the money had to be paid three days later, and that he didn't care "who died or what" (2B Tr. 52–54). Starks also told Rice that when he returned for the money Robinson would be there "to straighten this out" (2B Tr. 54). Fearing once again that his life was endangered, Rice contacted the Federal Bureau of Investigation (2B Tr. 55).

Petitioner Starks returned to the tavern on February 21. Clarence Starks and petitioner Robinson accompanied him but remained outside (2B Tr. 55–56; 5B Tr. 617–618). Petitioner Starks demanded $500 and threatened to have petitioner Robinson enforce the demand. Rice resisted payment, but Starks told him he had "better watch [his] life" (2B Tr. 61). After additional threats were made, Rice gave petitioner Starks an envelope containing money that had been marked by federal agents. Petitioner Starks and Clarence Starks were promptly arrested (2B Tr. 59–64). Rice had a tape recorder on his body, and the transaction was recorded. The recording was received in evidence at trial (3 Tr. 111).[2]

[2] Petitioners' defense was that the payments by Rice were *bona fide* contributions to a religious cause, not the product of extortion.

2. Petitioners were found guilty; Clarence Starks and Ferguson were acquitted by the jury. The court of appeals reversed petitioners' convictions and remanded for a new trial because the tape recording had been admitted into evidence without proper authentication (515 F.2d at 118–124). The court rejected many of petitioners' other arguments (*id.* at 124–125). It agreed with petitioners, however, that the indictment was duplicitous (*id.* at 115–118).[3] Because, in the court of appeals' view, a new trial was required by the erroneous admission of the tape recording, it did not pass upon the government's argument that the instructions to the jury prevented petitioners from being prejudiced by the duplicity of the indictment (*id.* at 118). In order to avoid similar problems at the next trial, the court of appeals instructed the government to elect between the conspiracy and attempt charges (*id.* at 118, 125).

3. At a pretrial conference on remand, the prosecutor stated that the government would proceed on the conspiracy charge. Petitioners then moved to dismiss the indictment, contending (1) that retrial would violate the Double Jeopardy Clause and (2) that the indictment, as modified by the election, does not charge an offense (A. 38–43). The motions were denied by the district court (A. 44–49), and petitioners immediately filed a notice of appeal.

The government, observing that *United States* v.

[3] The indictment and pertinent portions of the trial court's instructions are set forth at pages 56–58, *infra*, in which we address petitioners' claim that because of this duplicity their retrial is barred by the Double Jeopardy Clause.

DiSilvio, 520 F.2d 247, 248 n. 2a (C.A. 3), certiorari denied, 423 U.S. 1015, had held that the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds was immediately appealable, asked the court of appeals to overrule *DiSilvio* and to dismiss the appeal. The court of appeals did not respond to this request. After ordering the case to be submitted on the briefs without oral argument, the court affirmed without opinion, rejecting both of petitioners' contentions (A. 50–51).

SUMMARY OF ARGUMENT

I

The first question the Court must consider is whether the court of appeals had jurisdiction over petitioners' pretrial appeal from the denial of their motions to dismiss the indictment. We submit that it did not have jurisdiction.

1. "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." *DiBella* v. *United States*, 369 U.S. 121, 124. The First Judiciary Act did not provide for any appellate review in criminal cases. Until 1879, when the circuit courts were given jurisdiction by writ of error to review judgments of conviction in some criminal cases, the only method of review was by certificate, and that could be used only when the trial judges were evenly divided on a legal question and were unable to render a decision.

The first right to appeal was created in 1889, and that statute allowed review of convictions in capital

cases. When Congress revised the structure of the federal courts in 1891 it created a right to appeal from convictions of crimes punishable by imprisonment. Not until 1911 was there a general right of appellate review of all judgments of conviction.

Congress has given great attention to defining the circumstances under which an appeal is permissible. When Congress has perceived the need for greater review, it has provided that review. Interlocutory review has been particularly disfavored, however; the only provision for interlocutory review was the certificate of division, and that was necessary to enable the court to decide the case before it. Each time Congress has devised a statute pertaining to criminal appeals by defendants, it has either limited jurisdiction to review of convictions or used language commonly accepted as embodying a requirement of finality. Any exception to the finality principle has been explicitly articulated.

The intent of Congress to forbid interlocutory appeals by defendants is expressed most clearly in its reaction to a peculiar practice in the District of Columbia that threatened to delay the Teapot Dome trials because of a pretrial appeal. Congress passed a statute forbidding such pretrial appeals because, as the House Report (H.R. Rep. No. 1363, 69th Cong., 1st Sess. 2 (1926)) stated:

> [T]he allowance of [interlocutory] appeals has been given in civil cases but has not been recognized or provided for in criminal cases.
>
> * * * Delay in criminal cases is already a grave subject of general criticism and to allow appeals in interlocutory matters would serve to bring the administration of criminal law into greater discredit.

Only in recent years has Congress provided for any interlocutory review, and it has done so only in limited and specifically identified circumstances in which no review whatever could be had following final judgment. 18 U.S.C. 3731. There is no reason to believe that 28 U.S.C. 1291, which derives from an 1891 act, serves as a catch-all authorizing interlocutory appeals not otherwise provided for.

2. This Court has consistently rejected arguments by defendants in criminal cases that interlocutory appeal should be allowed in order to spare them the burdens of a trial that, they say, should not be held at all. In *Heike* v. *United States*, 217 U.S. 423, a witness had been compelled to testify in exchange for transactional immunity. He was later indicted, and he claimed that his immunity, which included the right not to be tried, extended to that crime. After the trial court rejected his arguments, Heike sought to appeal; this Court held that such a pretrial appeal was not authorized by statute. The Court acknowledged that its holding might compel Heike to stand trial unnecessarily and that the trial itself might be forbidden, yet it analogized Heike's predicament to that of one whose plea of former jeopardy is rejected and concluded that an appeal would not be allowed in either case until after a conviction. *Heike* has been reaffirmed and applied to other constitutional claims.

"[T]he whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act" (*Carroll* v. *United States*, 354 U.S. 394, 399) thus demonstrates that in criminal cases there is no appellate jurisdiction, absent an explicit statute, until the

entire case has come to a close and all questions concerning the propriety of a conviction can be reviewed at the same time. The wisdom of this course is obvious. In a federal criminal prosecution every question is a federal question. The resolution of any one of them may prove to be academic in light of later developments in the case. Although a trial court decides that the Double Jeopardy Clause does not bar the pending trial, it later may decide that critical evidence should be suppressed or that the Speedy Trial Clause forbids further proceedings. If the case goes to trial, the jury may acquit. If each potentially controlling constitutional question could be presented for resolution by the court of appeals before trial, litigation would be interminable, and the vital societal interest in speedy trial of criminal charges would be crippled; at the same time, the appellate courts would devote substantial resources to the resolution of questions that may become moot. During the time necessary to brief, argue and decide the appeal, evidence may be lost and memories may fade, thereby impairing the accuracy of verdicts when the trial finally is held.

3. Several courts of appeals have concluded, however, that double jeopardy claims are collateral to the issues of the case and therefore appealable under the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–547. *Cohen* was a civil case, and its principles are not easily transferrable to criminal cases, with their different history and needs. But however that may be, a double jeopardy claim is not collateral. The ultimate issue at stake in a criminal case is the propriety of the trial and conviction. A plea

of former jeopardy is simply one among many possible reasons why there should be no conviction. If the defendant is convicted, the double jeopardy claim can be raised on appeal; if the district court resolved it incorrectly, the conviction will be reversed. The claim is not forever lost if not resolved by appeal prior to trial.

It is true that the Double Jeopardy Clause, unlike some other constitutional provisions, may supply a reason why there should be no trial as well as a reason why there should be no conviction. Some courts have accordingly concluded that an interlocutory appeal is necessary to ensure "full enjoyment" of the right not to be tried. But the Double Jeopardy Clause is not different in this regard from the statute at issue in *Heike* or the constitutional claims raised in other cases. This Court consistently has held that "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325.

The argument that an interlocutory appeal is necessary whenever the defendant asserts a "right not to be tried" rests upon the unarticulated premise that an appeal is part of the right itself. As this Court has held, however, jurisdiction of appellate courts is defined by federal statutes and not by the nature of the right sought to be enforced. The question thus is not whether there is an abstract right not to be tried, but whether Congress has provided for pretrial appeals to contest a district court's decision to require the accused to stand trial. To assert that full enjoyment of the rights secured by the Double Jeopardy Clause requires an interlocutory appeal is to beg the very question presented by this case.

Perhaps occasional delay might seem to be an acceptable price to pay for ensuring the vindication of just claims. Common sense indicates, however, that because the district courts correctly resolve the vast majority of double jeopardy claims presented to them, the price for correcting a few errors before trial would be delay in many cases while defendants who find delay advantageous appeal from correct decisions. Congress might conclude that this price is not too dear, but it has not yet done so; until it does, defendants must await conviction before obtaining appellate review of their double jeopardy claims.

4. Finally, even if a court of appeals has jurisdiction over a pretrial appeal raising a double jeopardy claim, this jurisdiction should not be expanded to permit resolution of any other kind of claim—such as, in this case, petitioners' assertion that the indictment does not state an offense—even though appended to a double jeopardy claim. The only rationale for interlocutory review of double jeopardy claims is that they are severable from, and in urgent need of review before, the other issues in the case, and that they are unreviewable in any meaningful sense after final judgment. It would make a mockery of this rationale if the double jeopardy claim were then used as a bootstrap to review the other issues in the case, as the court of appeals did here.

II

Petitioners' double jeopardy argument is insubstantial. Although they were convicted under a duplicitous indictment, their convictions were reversed on appeal at their behest. Since *United States* v. *Ball*, 163 U.S.

662, it has been settled that the Double Jeopardy Clause "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (footnote omitted and emphasis deleted). Moreover, the instructions to the jury at the first trial precluded any possibility that petitioners had been implicitly acquitted of the crime with which they are now charged.

III

The indictment charges petitioners with an offense. It alleges a conspiracy to commit extortion. Petioners' reading of the indictment as charging that the object of the conspiracy was attempted extortion—that is, as charging that the conspirators intended to fail to extort money—is implausible. The attempted extortion was simply an overt act of the conspirators; an agreement to commit an unlawful act is a completed conspiracy whether or not it attains its end. Petitioners' further contention, that the indictment is defective because it does not allege that they agreed, misunderstands the nature of the crime of conspiracy; because a conspiracy is an agreement, an indictment need not allege both conspiracy and agreement.

ARGUMENT

Petitioners were tried and convicted. After their convictions were reversed at their behest, they asked the district court to dismiss the indictments. They argued that the Double Jeopardy Clause forbids a second trial and that the indictment does not charge an offense. The district court declined, concluding that petitioners' arguments had been foreclosed in large measure by the

court of appeals' order remanding the case for a new trial.

Before their second trial could begin, petitioners again appealed. The court of appeals affirmed without opinion, and petitioners have brought the case here. Unless the court of appeals had jurisdiction over petitioners' pretrial appeal, however, this case cannot be considered on its merits. This Court's first task, therefore, is to determine whether the court of appeals was empowered to entertain the interlocutory appeal. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737; *DiBella* v. *United States*, 369 U.S. 121.

I

A COURT OF APPEALS DOES NOT HAVE JURISDICTION TO HEAR ANY INTERLOCUTORY APPEALS BY DEFENDANTS IN CRIMINAL CASES

A. INTRODUCTION

1. The courts of appeals are divided on the question whether the denial of a motion to dismiss an indictment on double jeopardy grounds is immediately appealable. The majority have held that it is. *United States* v. *Lansdown*, 460 F.2d 164, 170–172 (C.A. 4);[4] *United States* v. *Beckerman*, 516 F.2d 905, 906–907 (C.A. 2); *United States* v. *DiSilvio*, 520 F.2d 247, 248 n. 2a (C.A. 3), certiorari denied, 423 U.S. 1015; *United States* v. *Barket*, 530 F.2d 181 (C.A. 8), certiorari denied November 1, 1976 (No. 75–1280). Cf. *Thomas* v. *Beasley*, 491 F.2d 507 (C.A. 6) (grant of pretrial writ of *habeas corpus* on double jeopardy grounds); *United States ex*

[4] See also *United States* v. *Hankish*, C.A. 4, No. 76–1334, decided July 1, 1976, certiorari dismissed November 11, 1976, No. 76–135, which extends the *Lansdown* principle to all double jeopardy claims, even frivolous ones.

rel. Webb v. *Court of Common Pleas*, 516 F.2d 1034 (C.A. 3) (same). Several courts have extended this holding in various ways. The Second Circuit has allowed a pretrial appeal to argue breach of a plea bargain allegedly involving a promise of non-prosecution. *United States* v. *Alessi*, 536 F.2d 978 (*Alessi I*). The Fourth Circuit has allowed a pretrial appeal from an order rejecting a speedy trial claim. *United States* v. *MacDonald*, 531 F.2d 196, petition for a writ of certiorari pending, No. 75–1892. The Third Circuit in the instant case considered a statutory claim that was appealed at the same time as a double jeopardy claim.

The Fifth and Ninth Circuits, however, have held that interlocutory appeals of double jeopardy issues are not permissible. *United States* v. *Bailey*, 512 F.2d 833, 836–838 (C.A. 5), certiorari dismissed, 423 U.S. 1039; *United States* v. *Young*, C.A. 9, No. 75–3102, decided October 19, 1976. The Seventh Circuit has dismissed an interlocutory appeal of this sort without opinion. *United States* v. *Bartemio*, No. 76–1039, decided April 5, 1976, petition for a writ of certiorari pending, No. 75–6657. And Judge Friendly now has written a thorough opinion for himself and Judge Van Graafeiland explaining why they consider *Bailey* to be right and *Beckerman* wrong. *United States* v. *Alessi*, C.A. 2, No. 76–1189, decided July 7, 1976 (*Alessi II*), petition for a writ of certiorari pending, No. 76–176.[5]

[5] Because *Alessi II* and *Young* are not yet published, we have reprinted them for the convenience of the Court as an appendix to this brief. The *Alessi II* panel eventually assumed jurisdiction and affirmed on the merits; because certiorari had been granted in the instant case, the panel decided not to seek *en banc* reconsideration of Second Circuit precedent.

2. In *Cobbledick* v. *United States*, 309 U.S. 323, this Court explained why interlocutory appeals may not be taken in criminal cases in the absence of explicit statutory authorization. It is difficult to improve upon the analysis of the unanimous Court, speaking through Mr. Justice Frankfurter, and so we set it out at some length (309 U.S. at 324–326):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act [2] and has been departed from only when observance of it would practically defeat the right to any review at all.[3] Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases.[4] An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. *Cogen* v. *United States*, 278 U.S. 221.

In thus denying to the appellate courts the power to review rulings at *nisi prius*, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying "final judgments and decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system.

---

[2] §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83–85. For a discussion of the historical background, English and American, of the finality concept, see Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539.

[3] See § 129 of the Judicial Code, 28 U.S.C. § 227, dealing with appeals from interlocutory injunctions, appeals from interlocutory decisions in receivership cases and from interlocutory decrees determining rights and liabilities in admiralty litigation.

[4] See *United States* v. *More*, 3 Cranch 159. Only by certificate of division of opinion in the circuit courts could review be obtained. See Curtis, Jurisdiction of the United States Courts, 82. By the Act of 1889 review as of right was allowed in capital cases. 25 Stat. 655, 656. For the history of federal criminal appeal see *United States* v. *Sanges*, 144 U.S. 310, 319–22.

The policies adduced by the Court in *Cobbledick* apply with like force to double jeopardy claims as to the many other constitutional claims that arise in a federal criminal case. All should await resolution in the ordinary course. Any other rule would lead to "leaden-footed" administration of justice, in which frivolous arguments could bring the process to a halt while evidence dissipates and the memories of witnesses fade. Moreover, the prohibition of interlocutory appeals will rarely work injustice. After all, the vast majority of

meritorious double jeopardy claims will be recognized by the district courts.[6] In some cases errors doubtless

---

[6] While we have no means of preparing a complete catalogue of cases in which interlocutory double jeopardy appeals have been entertained by the courts of appeals, we are aware of 10 such cases since *Lansdown*. In every one of these cases the court of appeals affirmed the district court's rejection of the double jeopardy claim. In each of the cases, moreover, the interlocutory appeal produced substantial delay. The delays in *Hankish* and the instant case are discussed in the text (see pp. 45–46, *infra*). *United States* v. *Barket*, *supra*, is another example. A two-count indictment was filed in May 1974. Barket was tried and acquitted on one of those counts early in 1975. He then moved to dismiss the other count, arguing that prosecution on it is barred by the Double Jeopardy Clause. The district court denied the motion and Barket appealed. The court of appeals dismissed portions of the appeal and affirmed on the remaining issues on December 9, 1975. Rehearing was denied in February 1976, and Barket filed a petition for a writ of certiorari (No. 75–1280), which was denied on November 1, 1976. The delay so far exceeds 18 months, and the trial still has not been held. Even when a court of appeals dismisses an interlocutory appeal for want of jurisdiction, the delay can be substantial. In *United States* v. *Young*, *supra*, the district court rejected the double jeopardy claim on August 8, 1975. Young appealed, and the case was not argued until the summer of 1976. The appeal was dismissed on October 19, 1976. Young still can file a petition for a writ of certiorari.

United States v. *MacDonald*, *supra*, is the only recent federal case in which a defendant has prevailed on an interlocutory appeal. That case involved the Speedy Trial Clause rather than the Double Jeopardy Clause. It is far from clear, however, that the district court's rejection of MacDonald's claim was in error. The court of appeals was divided, and we have filed a petition for a writ of certiorari (No. 75–1892). We have argued that the district court was right and the court of appeals was wrong; if this Court should agree with our arguments, MacDonald's case would return to the district court for trial after a substantial delay. (Trial had been set for August 1975, but the court of appeals stayed the trial pending resolution of the appeal.)

will occur, and in consequence a trial will be held that should not have taken place. But exposure to that risk "is one of the painful obligations of citizenship." The cost of correcting error before trial in a few cases is delay in many cases. Here, as with other constitutional claims, "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." 309 U.S. at 325–326.

This Court has not retreated from the views it expressed in *Cobbledick*. It stated, again unanimously, in *DiBella* v. *United States*, *supra*, 369 U.S. at 124, that "[t]he general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." On account of this principle, it held, neither the defendant nor the prosecution could appeal before trial from an adverse ruling on a constitutional search and seizure question, absent explicit statutory authority. The Court explained that "[t]his insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases" (*ibid.*).

Because so many courts of appeals have entertained pretrial appeals from the rejection of double jeopardy claims, however, we believe it necessary to explore the issue in greater depth. We begin with a discussion of the genesis of 28 U.S.C. 1291, the statute controlling

the right of defendants to appeal in criminal cases.[7] This jurisdictional statute must "be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " *Palmore* v. *United States*, 411 U.S. 389, 396, quoting from *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 212. Because Section 1291 is "so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act," it must be approached "in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction." *Carroll* v. *United States*, 354 U.S. 394, 399.

B. CONGRESS HAS GRANTED TO THE COURTS OF APPEALS IN CRIMINAL CASES THE POWER TO REVIEW, AT A DEFENDANT'S BEHEST, ONLY FINAL JUDGMENTS OF CONVICTION

1. The First Judiciary Act, 1 Stat. 73, did not provide any appellate review in federal criminal cases. Although the Act conferred appellate jurisdiction in certain civil cases,[8] the question of providing appellate re-

[7] Section 1291, the sole applicable statute, sets up the only avenue of appellate review for criminal defendants. A right of appeal, even as to constitutional questions, is not an element of due process of law. *McKane* v. *Durston*, 153 U.S. 684, 687. See also *United States* v. *MacCollom*, No. 74–1487, decided June 10, 1976, plurality slip op. 5; *Estelle* v. *Dorrough*, 420 U.S. 534, 536–537; *Ortwein* v. *Schwab*, 410 U.S. 656, 660; *Lindsey* v. *Normet*, 405 U.S. 56, 77; *Griffin* v. *Illinois*, 351 U.S. 12, 18; *District of Columbia* v. *Clawans*, 300 U.S. 617, 627; *Ohio* v. *Akron Park District*, 281 U.S. 74, 80; *United States* v. *Heinze*, 218 U.S. 532, 545–546; *Reetz* v. *Michigan*, 188 U.S. 505, 508; *Murphy* v. *Massachusetts*, 177 U.S. 155, 158.

[8] See Sections 10, 21 and 22 of the Act, 1 Stat. 77–78, 83–84.

view in criminal cases does not appear to have been discussed or considered, "either because the book learning about common law limitations upon the availability of the writ [of error] in criminal cases was generally accepted doctrine, or because of the sentiment against enhancement of the scope of the Supreme Court's appellate jurisdiction." Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 610 (1971). This Court early held that the Act had not conferred a right of appellate review in federal criminal cases.[9] *United States* v. *More*, 3 Cranch 159, 172; *Ex parte Kearney*, 7 Wheat. 37, 42.

The first statutory provision for appellate review in federal criminal cases was Section 6 of the Act of April 29, 1802, 2 Stat. 159, which allowed the two judges sitting on the circuit courts to certify a controlling question to the Supreme Court in the event of disagreement. This rarely led to consideration of the case by two courts; the "possibility of Supreme Court review on certificate of division of opinion in the circuit court was remote because of the practice of single district judge's holding circuit court." *Stone* v. *Powell*, No. 74–1055, decided July 6, 1976, slip op. 8 n. 7.[10]

In 1879 the circuit courts were given jurisdiction to review by writ of error final judgments in criminal

[9] The writ of error in criminal cases in England was not available to review felony or treason proceedings until relatively recent times, although discretionary review by extraordinary writ could sometimes be obtained. Congress may have contemplated a similar system of review in federal criminal cases. Orfield, *History of Criminal Appeal in England*, 1 Mo. L. Rev. 326, 332–333 (1936).

[10] See also *United States* v. *Daniel*, 6 Wheat. 542, 547–548.

cases tried before the district courts, if the sentence imposed included either imprisonment or a fine exceeding $300.[11] Such review was available, however, only at the discretion of a circuit judge. Act of March 3, 1879, 20 Stat. 354. Hence, "[f]or nearly a century trials under the Federal practice for even the gravest offences ended in the trial court, except in cases where two judges were present and certified a question of law" to the Supreme Court or where the circuit court allowed a writ of error. *Reetz* v. *Michigan*, 188 U.S. 505, 508.

In 1889 Congress first accorded some criminal defendants a right to appellate review. Section 6 of the Act of February 6, 1889, 25 Stat. 656, provided that a defendant had the right to a writ of error in the Supreme Court to review the "final judgment" of any federal court "in all cases of *conviction* of crime the punishment of which provided by law is death" (emphasis added).

Two years later Congress revised the structure of federal trial and appellate courts. Section 6 of the Circuit Court of Appeals Act, 26 Stat. 828, established circuit courts of appeals with "jurisdiction to review by appeal or by writ of error final decisions in the district court and the existing circuit courts in all cases other than those [reviewable by the Supreme Court]," including "cases arising * * * under the criminal laws * * *." The Act gave the Supreme Court jurisdiction to

[11] By this time the district courts had jurisdiction of all federal crimes and offenses not capital. Rev. Stat. § 563 (1873–1874). The circuit courts had exclusive jurisdiction over capital crimes and jurisdiction concurrent with the district courts over noncapital crimes. Rev. Stat. § 629, ¶ 20.

hear "appeals or writs of error" from the district or circuit courts "[i]n cases of *conviction* of a capital or otherwise infamous crime" (Section 5, 26 Stat. 827; emphasis added).[12] Because the term "infamous crimes" as used in the statute included all crimes punishable by imprisonment (*In re Claasen*, 140 U.S. 200, 204–205), the new circuit courts of appeals did not have appellate jurisdiction over significant cases until six years later. The Act of January 20, 1897, 29 Stat. 492, amended the Circuit Court of Appeals Act to provide that "appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of *conviction* of an infamous crime not capital" (emphasis added).

With the later enactment of the Judicial Code, Congress granted to the circuit courts of appeals jurisdiction to review "by appeal or writ of error final decisions in the district courts * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court." Act of March 3, 1911, Section 128, 36 Stat. 1133.[13] Because Congress also ended this Court's jurisdiction over writs of error in capital cases (Section 238, 36 Stat. 1157), the Judicial Code effectively transferred to the circuit courts of appeals the jurisdiction to review almost all convictions

[12] This enactment also gave defendants a right of appeal from a final judgment to the Supreme Court where the jurisdiction of the lower court was in issue or where a constitutional claim was involved (see *Motes* v. *United States*, 178 U.S. 458, 466–467) and repealed the method of reviewing questions arising in the lower courts by certificate of division (*United States* v. *Hewecker*, 164 U.S. 46).

[13] This Act also abolished the circuit courts. Section 289, 36 Stat. 1167.

in criminal cases. See *Carroll* v. *United States*, *supra*, 354 U.S. at 400–401 n. 9.

In 1925 Congress repealed the provisions of the Circuit Court of Appeals Act that had allowed direct appeal to the Supreme Court in all cases in which the jurisdiction of the lower court was attacked or constitutional claims were raised. Act of February 13, 1925, Section 238, 43 Stat. 938. This established a system of review at the behest of defendants in criminal cases identical in substance to the powers of today's courts of appeals. Only two changes have been made since then. First, Congress abolished the "writ of error" and provided that all cases would be reviewed by appeal.[14] Act of January 31, 1928, 45 Stat. 54. This statute was not intended to change the scope of appellate review. See Act of April 26, 1928, 45 Stat. 466. Second, in 1948 the circuit courts of appeals were renamed the United States Courts of Appeals. Act of June 25, 1948, Section 43(a), 62 Stat. 870. The language of the 1948 Act delineating the jurisdiction of the courts of appeals is now found in 28 U.S.C. 1291, which grants to the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States * * *."[15]

[14] See generally Payne, *The Abolition of Writs of Error in the Federal Courts*, 15 Va. L. Rev. 305 (1929). A great deal of confusion had arisen as to when an appeal was appropriate and when a writ of error should be used. Congress had attempted to alleviate this problem 12 years earlier (Act of September 16, 1916, Section 4, 39 Stat. 727), and it finally eliminated the problem by abolishing the writ.

[15] Appeals by the United States are governed by 18 U.S.C. 3731. For a history of the development of the right of the prosecution to appeal, see *United States* v. *Wilson*, 420 U.S. 332, 336–339; *Carroll* v. *United States*, *supra*.

2. Two themes run through this history. First, when Congress has perceived a need for more expansive appeal rights in criminal cases, it has provided them explicitly. Appellate jurisdiction is entirely a statutory matter, and courts are not free to expand their own jurisdiction in response to arguments that have not yet commended themselves to Congress. Second, whenever Congress has devised a statute pertaining to criminal appeals alone, it has either limited jurisdiction to review of convictions or sentences, or explicitly provided for interlocutory review. Compare 20 Stat. 354, 25 Stat. 656, and 26 Stat. 827, with 18 U.S.C. 3731. Any exception to the finality principle has been plainly expressed.

The Act of April 29, 1802, which granted Supreme Court jurisdiction on certificate of division, allowed interlocutory review, which Congress carefully circumscribed. The statute provided (Section 6, 2 Stat. 160–161) that Supreme Court resolution of a question raised on certificate of division was not to "prevent the cause from proceeding, if, in the opinion of the court, farther proceedings can be had without prejudice to the merits * * *." [16] In other statutes the restrictions

[16] Even so, this Court narrowly construed its jurisdiction to review on certificate of division. *United States* v. *Rosenburgh*, 7 Wall. 580, and *United States* v. *Avery*, 13 Wall. 251, held that review was unavailable where the division arose on a motion to quash the indictment. In *Avery* the motion to quash had challenged the court's jurisdiction over the offense. Despite a division on the question of jurisdiction, this Court dismissed the certificate on the authority of *Rosenburgh*, which had held there was no jurisdiction because the motion to quash "was clearly determinable as a matter of [the circuit court's] discretion" and because "the denial of the motion could not finally decide any right of the defendant," since the grounds asserted in the motion were "left to be availed of, if available, upon demurrer or motion in arrest of judgment." 7 Wall. at 583.

have been even more pronounced.[17] See 18 U.S.C. 3147 (appeal from decision setting conditions of release). Indeed, the requirement of finality was so much accepted as a precondition to appellate review that Congress' neglect to use the term "final" in describing what decisions were appealable has been held to afford no basis for allowing interlocutory review. *McLish* v. *Roff*, 141 U.S. 661, 665.

3. The intent of Congress to forbid interlocutory appeals in criminal cases except where explicitly author-

[17] Congress has enacted for the District of Columbia a provision allowing the government to take interlocutory appeals to the District of Columbia Court of Appeals from certain rulings made during the trial; that court must authorize the appeal and decide the case within 96 hours. 23 D.C. Code 104(d).

The Criminal Appeals Act, 18 U.S.C. 3731, explicitly sets out a right of interlocutory appeal for the prosecution. This statute, and 18 U.S.C. 2518(10)(b), which also provides for interlocutory appeals by the prosecution, conditions such appeals on the making of a certificate of good faith by a responsible public official. Both statutes also require expeditious resolution of the appeal. See also 28 U.S.C. 1826(b) (courts of appeals must act within 30 days on appeals in civil contempt cases).

In civil cases, too, interlocutory appeals are allowed only in carefully defined circumstances. 28 U.S.C. 1292(a) allows appeals as of right from orders granting or denying interlocutory injunctions; 28 U.S.C. 1292(b) allows interlocutory appeals by permission of the district court and the court of appeals, where resolution of an issue could materially advance the termination of the litigation. Other statutes pertain to but a single subject matter, and many of them are catalogued in *DiBella*. These examples suggest that Congress, far from using 28 U.S.C. 1291 as an authorization for interlocutory appeals in all cases not specifically provided for elsewhere, intended that Section 1291 would authorize, as it says, appeals from only "final" decisions.

ized is demonstrated most clearly by the Act of July 3, 1926, 44 Stat. 831, which provided:

> [N]othing contained in any Act of Congress shall be construed to empower the Court of Appeals of the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding * * *.

This statute was enacted to put a stop to a practice allowing interlocutory appeals by leave of court, which had begun just before the turn of the century. See *Ainsworth* v. *United States*, 1 App. D.C. 518, 520; D.C. Code § 226 (1901).

Congress enacted the statute to terminate pretrial legal maneuvering that threatened to delay criminal proceedings in one of the Teapot Dome cases. Three of the defendants, including former Secretary of the Interior Fall, had filed demurrers to their indictment, arguing that the indictment did not charge an offense, was based on an erroneous interpretation of an act of Congress, and was duplicitous.[18] The demurrers were overruled by the trial judge, but the court of appeals entered an order allowing an interlocutory appeal. See 67 Cong. Rec. 12990–12991 (1926). Senator Walsh, an active participant in the investigation of the scandal, introduced the bill that became the Act of July 3, 1926, in order to prevent further delay in these criminal cases. 67 Cong. Rec. 9884 (1926).

Reporting favorably on the bill, the Senate Judiciary Committee stated (67 Cong. Rec. 9968 (1926)): "[A]n appeal from an interlocutory order in a criminal case

[18] Demurrers in Cr. Nos. 43,324 and 43,325, Supreme Court of the District of Columbia, filed October 5, 1925, and November 3, 1925.

is an anomaly. No such procedure is authorized or tolerated in the Federal system generally * * *." The House Report (H.R. Rep. No. 1363, 69th Cong., 1st Sess. 2 (1926)) elaborated:

> [T]he allowance of [interlocutory] appeals has been given in civil cases but has not been recognized or provided for in criminal cases. The construction placed on the section of the District Code [Section 226] by the court is unusual and makes the practice in the District out of harmony with that obtaining elsewhere.
>
> * * * Delay in criminal cases is already a grave subject of general criticism and to allow appeals in interlocutory matters would serve to bring the administration of criminal law into greater discredit.

The Act passed, the court of appeals dismissed the appeal, the case went to trial, Fall was acquitted, and a substantial amount of time was saved. Werner and Starr, *Teapot Dome* 209 (1959). The particular circumstances that gave rise to that statute have passed,[19] but the House Committee's observations still reflect the legislative design.

C. THIS COURT CONSISTENTLY HAS HELD THAT DEFENDANTS IN FEDERAL CRIMINAL CASES MAY NOT APPEAL BEFORE A JUDGMENT OF CONVICTION HAS BEEN RENDERED

"[T]he whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act" (*Carroll* v. *United States*, *supra*, 354 U.S. at 399) demonstrates that in criminal cases there is no right of appeal by a defendant until the entire case has come

[19] The Act was repealed in 1948 as obsolete. 62 Stat. 865. See *Carroll* v. *United States*, *supra*, 354 U.S. at 412.

to a close and all questions concerning the propriety of a conviction can be reviewed at the same time. The wisdom of this course is obvious. Each federal criminal case presents a multitude of federal questions requiring resolution by the trial court. Does the indictment state an offense? Is the statute constitutional as applied to the defendant's conduct? Is particular evidence admissible? Has the accused voluntarily waived one or more of his procedural rights, whether constitutional or statutory in origin? Although the answer to any one question may influence the outcome of the litigation, the answer to any of the other questions may have greater influence. Although the trial court decides that the Double Jeopardy Clause does not bar the pending trial, it later may decide that the Speedy Trial Clause or the statute of limitations forbids additional proceedings or that critical evidence should be suppressed. If the trial proceeds to verdict, the jury may acquit.

The aphorism that "justice delayed is justice denied" applies with special force to criminal cases. There is a compelling societal interest both in the swift punishment of the guilty and in the prompt exoneration of the innocent. Cf. *Barker* v. *Wingo*, 407 U.S. 514, 519–521. But if each important constitutional question were resolved in a separate appeal before trial, litigation could be interminable. What is more, many of the questions would be presented in an analytical vacuum: pretrial resolution of a speedy trial argument, for example, is particularly difficult because the prejudice caused by the delay may be impossible to assess until the witnesses have testified. Resolution of many of the questions hypothetically presented in a case and potentially

affecting its outcome may become unnecessary in light of the resolution at trial of other questions. The time taken to decide questions that may prove to be academic would delay an appellate court's consideration of other pressing matters properly before it. During the time needed to decide the appeal, moreover, evidence may be lost and memories may fade. These considerations explain why this Court has set its face against piecemeal adjudication of criminal cases, why it has consistently required that "the whole case and every matter in controversy in it [be] decided in a single appeal." *McLish* v. *Roff*, *supra*, 141 U.S. at 665–666.

A final decision "in a criminal case means sentence." *Berman* v. *United States*, 302 U.S. 211, 212. See also *Parr* v. *United States*, 351 U.S. 513, 518. The meaning of this principle is illustrated by *Heike* v. *United States*, 217 U.S. 423, a case in which a defendant who claimed absolute immunity from prosecution as well as from conviction attempted to take a pretrial appeal from a decision requiring him to stand trial. We submit that the Court's decision in *Heike* controls the instant case.

Heike was indicted and pleaded absolute immunity from prosecution because he had previously been compelled to testify before a grand jury regarding the subject matter of the indictment. The plea was denied and the case was set for trial. Heike sought immediate review, pointing out that the immunity statute provided that no person compelled to testify "shall be prosecuted," and arguing that "[t]o permit the trial to proceed takes away that which never can be restored," namely the right not to be prosecuted (217 U.S. at 424). The judgment was thus final, Heike contended, and an

appeal should be allowed. The Court disagreed,[20] observing that the denial of Heike's plea had "not dispose[d] of the whole matter litigated," that is, "the right to convict the accused of the crime charged in the indictment." *Id.* at 429. The Court continued (*id.* at 430):

> As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. It may be that upon trial the defendant will be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in this case. It is true that in a certain sense an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory rulings and orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error. The purpose of the statute is to give a review in one proceeding after final judgment of matters in controversy in any given case. Any contrary construction of the Court of Appeals Act may involve the necessity of examining successive appeals or writs of error in the same case, instead of awaiting, as has been the practice since the beginning of the Government, for one review after a final judgment, disposing of all controversies in that case between the parties.

The Court analogized Heike's predicament to that of one whose plea of former jeopardy is rejected, and, in language especially pertinent here, it concluded that the cases should be treated alike (*id.* at 432–433):

[20] The Court had held in *Brown* v. *Walker*, 161 U.S. 591, 608–609, that a statute granting transactional immunity to a witness compelled to testify before the grand jury was constitutionally adequate even though "the witness * * * may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance."

> The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment. In the case of *Rankin* v. *The State*, 11 Wall. 380, an attempt was made to bring to this court a judgment of a state court upon a plea in bar of former conviction in a capital case. But this court, speaking by Mr. Justice Bradley, said:
>
> "* * * [I]n no sense can that judgment be deemed a final one* * *" [21]
>
> It may thus be seen that a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution, and this notwithstanding the person is in jeopardy a second time if after one conviction or acquittal the jury is empanelled to try him again.

The Court's reasoning in *Heike* was straightforward: the immunity statute created a right not to be tried as well as a right not to be convicted, but it did not create a right to take an interlocutory appeal. The right not to be tried was left to be vindicated in the trial court.[22] Nothing in the subsequent decisions of this

[21] Rankin was indicted for murder in Tennessee. He had been acquitted by court-martial of the same offense and accordingly interposed a plea of former acquittal. The trial court sustained the plea, but the Supreme Court of Tennessee reversed and remanded for trial. This Court held that it was without jurisdiction to review the Tennessee judgment.

[22] The Court not only declined to hear the interlocutory appeal but also refused to issue a writ of mandamus. *Ex parte Heike*, 30 S. Ct. 576. The Court ultimately considered the issue on the merits after Heike was convicted and rejected his claim. 227 U.S. 131.

Court has undermined the validity of *Heike* or the soundness of its approach.

In *Cogen* v. *United States*, 278 U.S. 221, the Court held that there was no appellate jurisdiction to review before trial an order refusing to suppress evidence that the defendant alleged had been unconstitutionally seized. Cogen argued that the order refusing to suppress was "final" because it would not later be reexamined by the trial court; this Court agreed and assumed that an erroneous denial of suppression might cause much inconvenience, expense and annoyance—it might even cause an unnecessary trial. That was not enough, however, for a denial of suppression could be reviewed on appeal from a judgment of conviction (278 U.S. at 224–225).

Eastman v. *Ohio*, 299 U.S. 505, summarily dismissed an appeal on the authority of *Rankin* and *Heike*.[23] *Cobbledick*, which we already have discussed, held that even third-party witnesses could not obtain review of orders affecting them until the conclusion of the trial proceedings, unless they were meanwhile held in contempt.[24]

---

[23] See also *Polakow's Realty Experts, Inc.* v. *Alabama*, 319 U.S. 750.

[24] This principle has been modified in certain extreme situations. See *United States* v. *Nixon*, 418 U.S. 683. Cf. *Maness* v. *Meyers*, 419 U.S. 449, 458–468. It retains full vitality in ordinary cases, however. *United States* v. *Ryan*, 402 U.S. 530.

Cobbledick distinguished *Perlman* v. *United States*, 247 U.S. 7, upon which *amicus curiae* relies (Br. 5–6), as a case in which utterly no review of the third-party's claims would be available without prompt appeal; in *Perlman* the disputed documents were in the hands of the prosecution and the third party thus could not obtain review by standing in contempt. As the Court pointed out, that is an unusual situation, and *Perlman* does not stand for a broad principle of jurisdiction. See 309 U.S. at 328–329.

In *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, the defendants in a criminal antitrust case pleaded that the district court lacked jurisdiction and that they were immune. When the court rejected the plea, the defendants sought mandamus. This Court conceded that there may be enormous costs in taking part in a trial that never should occur, but it held that interlocutory review should not be allowed. It wrote (319 U.S. at 30):

> Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take if Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.

Parr v. *United States*, 351 U.S. 513, reaffirmed *Heike* and held that an accused could not obtain pretrial review of an order dismissing an indictment in one district and allowing a prosecution to proceed in another. Parr had argued, not without foundation, that the order dismissing one of the indictments was "final," and he protested that the proceedings on the second indictment were void from their inception. That was not enough, the Court concluded: "The testing of the effect of the dismissal order must abide petitioner's trial, and only

then, if convicted, will he have been aggrieved" (351 U.S. at 517). The Court held that the decision was not "final" because there was no judgment of conviction (*id.* at 518), and it concluded that a defendant's desire to avoid a trial that may turn out to be unnecessary is insufficient to set up a right of appellate review before trial (*id.* at 519).[25]

Carroll v. *United States*, *supra*, held that the government could not appeal from a pretrial order suppressing evidence, even when that order would sound the death knell of the prosecution. The likelihood that the erroneous decision would lead to the acquittal of a guilty defendant did not support an appeal, the Court reasoned, because "[a]ppeal rights cannot depend on the facts of a particular case" (354 U.S. at 405). It concluded (*id.* at 406): "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable." If problems of this sort call for interlocutory review, the Court held, Congress rather than the Court must provide for that review (*id.* at 407–408).

DiBella v. *United States*, *supra*, reaffirmed *Cogen* and *Carroll*. The Court once more pointed out that decisions are "final" for purposes of appellate review in criminal cases only after the proceedings have ended

[25] The Court also held that mandamus would not lie to prevent the arguably unnecessary trial. Citing *Roche*, the Court concluded that mandamus would not be allowed to substitute for the appeal that would be available after a conviction (*id.* at 520–521).

in conviction.[26] The defendants had argued that suppression motions involve issues "collateral" to the general issue of guilt or innocence, and that suppression decisions made before trial are "final" because they finally determine the admissibility of evidence. The Court responded that such decisions are neither collateral nor final because they vitally affect the outcome of the prosecution itself; that being so, they can be reviewed on appeal from a judgment of conviction (369 U.S. at 127). *DiBella* also observed: "Congress has recognized the need of exceptions for interlocutory orders in certain types of proceedings where the damage of error unreviewed before the judgment is definitive

[26] *Amicus curiae* (Br. 5) makes much of the fact that 28 U.S.C. 1291 speaks of "final decisions" rather than "final judgments." The same language was at issue in *Heike* and *DiBella*, however, and the Court found it to be of no moment. Congress has historically used the terms interchangeably. See 1 Stat. 77–78, 5 State. 539, 9 Stat. 450, 455, 10 Stat. 176, 14 Stat. 386, 387, 15 Stat. 44, Rev. Stat. §§ 763, 764. Compare Rev. Stat. § 702 with § 1911.

The term "final decision" in Section 1291 is derived from the 1891 Circuit Court of Appeals Act; prior to its enactment this Court had decided that "final decision" and "final judgments and decrees" were identical in import. *Harrington* v. *Holler*, 111 U.S. 796. Moreover, as *McLish* v. *Roff*, *supra*, makes clear, the Court has implied a requirement of finality in jurisdictional statutes even when it was not well expressed. See also *Ex parte Tiffany*, 252 U.S. 32, 36. It is also of interest that when Congress first used the term "final decision" in the Circuit Court of Appeals Act, the criminal jurisdiction of the circuit courts of appeals was limited to petty crimes. *In re Claasen*, *supra*, 140 U.S. at 204–205. The words "final decisions" as applied to felony cases did not acquire meaning until Congress transferred to the circuit courts jurisdiction that previously had belonged to this Court. The transferred jurisdiction permitted appeals only from judgments of conviction. 29 Stat. 492, 36 Stat. 1133, 1157.

and complete * * * has been deemed greater than the disruption caused by intermediate appeal" (*id.* at 124). Each of these exceptions, however, was addressed to civil actions (*id.* at 126), and the Court therefore concluded that it should not create a similar exception for criminal cases.

The conclusion of *DiBella* that appeals lie in criminal cases only with explicit legislative authorization is no less sound today. The costs of delay in criminal cases are great. The Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, demonstrates Congress' desire to expedite criminal cases to the greatest extent feasible. Congress now has authorized interlocutory appeals in criminal cases (only by the prosecution) in two carefully designed provisions (18 U.S.C. 2518(10)(b) and 3731), both of which address particular problems and call for prompt appellate decisions. Interlocutory appeals cannot be taken under these statutes without a certificate of good faith by a responsible public official. See also 18 U.S.C. 3147 (appeals from orders setting bail).

We submit that it is utterly implausible to believe that Congress, which has created these limited rights of interlocutory appeal with such care, could have intended 28 U.S.C. 1291 to serve as a catch-all, authorizing interlocutory appeals in any other situation that might be thought to be "important." That, however, is the interpretation several courts of appeals have given to Section 1291 (see pages 13–14, *supra*). They have done so because they believe that double jeopardy claims deserve special treatment, not only because a double jeopardy claim may state a good reason not to hold a

trial at all but also because such claims are deemed to be "collateral" to the other issues in the prosecution. We now turn to an examination of these arguments.

D. THERE IS NO SUFFICIENT JUSTIFICATION FOR TREATING DOUBLE JEOPARDY CLAIMS DIFFERENTLY FROM OTHER CLAIMS FOR PURPOSES OF INTERLOCUTORY APPEAL

1. *Double jeopardy claims do not present issues "collateral" to the prosecution*

The courts of appeals that have allowed pretrial appeals from the rejection of a claim of former jeopardy have relied upon the "collateral order doctrine" articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–547. *Cohen* was a diversity action. Before trial the question arose whether a state statute requiring the plaintiff to post security applied in federal court. The district court thought not; the court of appeals reversed and ordered the posting of security. This Court concluded that the court of appeals had jurisdiction.

It began with the settled principle that there can be no appeal before trial, "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results" (337 U.S. at 546). The Court concluded, however, that an order to post security had nothing to do with the merits of the litigation, and that the question whether the plaintiff should have been required to post security could not be reviewed on appeal from a judgment in defendant's favor. The order with

respect to security therefore fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred" (*ibid.*). The Court concluded (*id.* at 546–547): "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

Our discussion to this point demonstrates that the principles governing appeals in civil cases cannot be transferred so easily to criminal cases, with their different jurisdictional development and greater need for expedition. However that may be, it is clear that the rejection of a double jeopardy claim is not a collateral order within the meaning of *Cohen*. Quite the contrary, a claim of former jeopardy calls into question the core issue of the case—"the right to convict the accused of the crime charged in the indictment" (*Heike, supra*, 217 U.S. at 429; *Parr* v. *United States, supra*, 351 U.S. at 518–519). A double jeopardy claim is simply one reason why there should be no conviction. If the district court errs in favor of the government, its error can be corrected (if a conviction ensues) by reversal on appeal.

The best evidence that the double jeopardy claim is not "collateral" is the fact that it cannot be litigated without blocking further proceedings in the case. The question of security litigated in *Cohen* could be resolved without halting other proceedings. The related question of the amount of bail, litigated in *Stack* v. *Boyle*, 342

U.S. 1—the only occasion this Court has applied *Cohen* to a criminal case—also was wholly independent of any questions concerning the propriety of the prosecution and the validity of any conviction. The question concerning the defendant's right to release prior to trial does not merge with a final judgment, and an appellate court can consider bail questions while the trial court moves on to other things, as Mr. Justice Jackson observed in his concurrence (342 U.S. at 12).

2. *A right of interlocutory appeal is not necessary to obtain "full enjoyment" of the rights protected by the Double Jeopardy Clause*

The double jeopardy claim is neither severable from nor collateral to the main issues of the criminal trial. The courts of appeals that have entertained pretrial double jeopardy appeals have observed, however, that the Double Jeopardy Clause protects against repetitious trials as well as against multiple convictions, and they have argued that the accused cannot obtain the "full enjoyment" of his right to be free of repetitious trials unless interlocutory review is available. Although the premise of this argument is correct,[27] the conclusion does not follow.

Judge Friendly has characterized as "seductive" the observation that "a defendant is entitled under some circumstances to be protected from an unlawful trial and not simply from an unlawful conviction" (*Alessi*

---

[27] See *Breed* v. *Jones*, 421 U.S. 519; *Green* v. *United States*, 355 U.S. 184, 187–188.

II, *supra*; see App., *infra*, p. 8A). And so it is.[28] There appears to be but a short step from that observation to the conclusion that there must be a right of interlocutory appeal, else defendants no longer could have the "full enjoyment" of their constitutional rights. The step from the observation to the conclusion rests, however, on the unarticulated minor premise that appellate review of claims to a particular right is *part* of its full enjoyment. Use of that minor premise, however, begs the very question presented here—whether Congress

[28] Part of its seductiveness comes from the fact that it is not entirely accurate. The Double Jeopardy Clause does not always preclude a second trial as well as a second conviction. Principles of collateral estoppel, which are incorporated in the Double Jeopardy Clause (*Ashe* v. *Swenson*, 397 U.S. 436), are rules of evidence. Once facts have been found by the trier of fact in one case, the prosecution cannot seek to persuade a second jury to the contrary. But collateral estoppel may operate to exclude some proof in a criminal case without forbidding all of it; in this context, the Double Jeopardy Clause is a rule of evidentiary exclusion and should be treated no differently from other reasons to exclude evidence, such as violations of the Fourth Amendment. Claims founded upon *Ashe* therefore should be controlled by *DiBella*, regardless of the outcome of the instant case.

This Court appeared to hold in *Harris* v. *Washington*, 404 U.S. 55, that collateral estoppel claims based upon *Ashe* state reasons why there should be no trial at all. Although this observation may be accurate when the evidence in the second prosecution is identical to that in the first, we submit that it cannot be generalized to all collateral estoppel cases. It is not difficult to imagine cases in which the evidence to which collateral estoppel might apply is only tangentially relevant to the central issues in the prosecution. See *Phillips* v. *United States*, 502 F.2d 227 (C.A. 4), set aside in part *en banc*, 518 F.2d 108, vacated and remanded, 424 U.S. 961, conviction affirmed on remand, 538 F.2d 586.

has established a right of interlocutory appeal in criminal cases. To reason that there must be an appellate test of every claim that a district court has erred avoids the question by assuming the conclusion. It is quite likely, in light of the history we have recounted at pages 19–27, *supra*, that Congress intended the trial courts to be the only tribunals to pass upon certain claims in criminal cases. As the Court put it in *Carroll* v. *United States*, *supra*, 354 U.S. at 406, some interlocutory decisions are "never satisfactorily reviewable."

Many of the cases in which this Court has declined to allow interlocutory appeal involved claims that the appeal was necessary to obtain "full enjoyment" of the asserted right. In *Heike* the defendant asserted absolute immunity under a statute forbidding the prosecution itself; the statutory immunity had been conferred as a substitute for the constitutional privilege against self-incrimination. In *Parr* the defendant asserted that further proceedings were absolutely barred, in light of certain constitutional provisions, by the dismissal and reindictment. In *Roche* the defendants asserted a form of absolute immunity. In the other cases we have discussed, including *Cobbledick* and *DiBella*, the defendants argued that they should not be put to the time and expense of trial when the proceedings were (they argued) certain to be so infected with constitutional error that a reversal on appeal was inevitable. The Court has held, however, that arguments about inconvenience and expense are not a satisfactory substitute for a statute authorizing appeals.

A rule allowing immediate appeals of pretrial orders rejecting double jeopardy claims would rest, as a legis-

lative matter, on a number of empirical assessments. A legislature would decide whether double jeopardy claims are now being erroneously rejected in unacceptable numbers by district courts and whether, if an appeal were allowed, those errors would be corrected. It would then weigh these gains against the drawbacks of allowing pretrial appeals, foremost among which are the delay that will be engendered and the costs that will be incurred in the many cases where the double jeopardy claim was properly rejected by the trial court, but the accused nonetheless appeals.[29]

It is far from clear that the benefits of pretrial appeals outweigh the costs: petitioners have not shown, for example, that significant numbers of valid double jeopardy arguments are rejected by the district courts.[30] In any event, that choice is not for this Court; it is for Congress, and Congress has declined to extend to defendants in criminal cases the right of interlocutory appeal that it has made available to the government in carefully limited situations (see 18 U.S.C. 2518 (10) (b) and 3731).

A judge-made rule permitting interlocutory appeals whenever a defendant asserts a right not to be tried would be illimitable, and it would lead to the very review by piecemeal that Congress intended to avoid. As Judge Friendly put it in *Alessi II* (App., *infra*, pp. 27A–28A; footnote omitted):

[29] Another cost arises in that small class of cases in which the district court correctly rejects a double jeopardy claim, a court of appeals erroneously reverses, and the matter must be set to rights in this Court—all prior to trial.

[30] See note 6, *supra*.

> We have little doubt that * * * once *Cohen* is construed to have created a "right not to be tried" exception to the final decision rule in criminal cases, it will be hard to limit the claims for such review which counsel will advance. This is not just an "alarming specter," as the Government put it in *Lansdown*, 460 F.2d at 172; in four short years the "specter" has acquired a number of earthly embodiments.

The Fourth Circuit has held that the Speedy Trial Clause creates a "right not to be tried" that can be the subject of a pretrial appeal (*United States* v. *MacDonald*, *supra*); the Second Circuit has held that a plea bargain can create a "right not to be tried" that can be the subject of a pretrial appeal (*Allessi I*, *supra*); in all probability, this is only the beginning.[31] To allow pre-

[31] Numerous provisions of the Constitution arguably forbid not only a conviction but also the judicial proceedings leading to a conviction:

(1) The Speech and Debate Clause (Article I, Sec. 6, cl. 1) provides that a member of Congress "shall not be questioned in any other Place" for his official acts. See *McSurely* v. *McClellan*, 521 F.2d 1024 (C.A.D.C.) (rehearing *en banc* pending on merits only), and *Rowley* v. *McMillan*, 502 F.2d 1326 (C.A. 4), the former holding that in civil cases an immediate appeal lies from a pretrial order rejecting a defense of legislative or official immunity and the latter that mandamus lies. Cf. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491; *Gravel* v. *United States*, 408 U.S. 606.

(2) The Grand Jury Clause of the Fifth Amendment provides that no individual shall be "held to answer" for a capital or infamous crime except upon indictment. Because this protection may be implicated any time an indictment is altered (*Ex parte Bain*, 121 U.S. 1), it could be a fruitful source of pretrial appeals, even when the alteration is perfectly proper.

(3) Trials instituted as part of a bad faith campaign to "chill" First Amendment rights also might fall into a prohibited category. See *Dombrowski* v. *Pfister*, 380 U.S. 479. Cf. *Allee* v. *Medrano*, 416 U.S. 802 (federal injunction against state proceedings used to harass people exercising other con-

trial appeals simply upon the assertion of the defendant that prompt review is necessary to ensure "full enjoyment" of his constitutional rights is to erode, if not to discard, the principle that "[t]he burden of a possibly needless trial [is] not sufficient reason for instant appealability" (*Alessi II;* App., *infra*, p. 15A).[32]

---

stitutional rights). Harassment and bad faith are easy to allege and difficult to disprove. Obscenity prosecutions, in which the defendant asserts that the materials are absolutely protected by the First Amendment, also could lead to pretrial appeals.

(4) Trial also might be barred if the prosecution were founded on racially discriminatory reasons (*Yick Wo* v. *Hopkins*, 118 U.S. 356) or were the result of unconstitutionally discriminatory enforcement. Such claims, while seldom meritorious (see *Oyler* v. *Boles*, 368 U.S. 448, 456), are often made.

(5) It is not difficult to invent other cases, and this Court's decisions under the civil rights removal statutes (*Johnson* v. *Mississippi*, 421 U.S. 213; *Georgia* v. *Rachel*, 384 U.S. 780; *Greenwood* v. *Peacock*, 384 U.S. 808) discuss circumstances under which a trial itself would be a violation of constitutional rights.

[32] We do not contend that all other assertions that there is a "right not to be tried" are equivalent to double jeopardy claims. The Double Jeopardy Clause creates a special interest in the avoidance of the trial itself that is not duplicated even in other claims of a right not to be tried. For example, although the Fourth Circuit has held in *United States* v. *MacDonald*, *supra*, that the Speedy Trial Clause of the Sixth Amendment creates a right not to be tried, the individual's interest in being free of trial is not of paramount concern under a Sixth Amendment analysis. The Speedy Trial Clause is primarily designed to foster the interests of society in the expeditious resolution of criminal cases and to shield the individual against prejudicial delays. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 519–522. See also *United States* v. *Ewell*, 383 U.S. 116, 120. The delay, not the trial itself, offends against the constitutional guarantee, and a "right not to be tried" is simply incidental to the remedy for delay. Similarly,

This case and others in the same vein illustrate the dangers of piecemeal review. In almost all of the cases the courts of appeals have assumed jurisdiction over the double jeopardy claim only to reject the defendant's position on the merits. In the meanwhile valuable time has been lost. In the instant case petitioners were convicted and won reversal on appeal. That decision was handed down on April 21, 1975, yet the retrial that the court of appeals ordered still has not begun. Petitioners' arguments on the merits are insubstantial (see pages 56–67, *infra*), but have afforded petitioners lengthy delay.

Other examples are even more unsettling. Paul Hankish was convicted in July 1973 for crimes committed in 1971. He argued on appeal that the evidence was insufficient to support the conviction and that certain evidence was improperly admitted. On October 28, 1975, the court of appeals agreed with the latter argument but rejected the former, and it remanded for a new trial. *Martin* v. *United States*, 528 F.2d 1157 (C.A. 4). On remand Hankish persisted in his argument that the evidence was insufficient, and he added the argument that, because of this, a second trial would be barred by the Double Jeopardy Clause. The district court rejected this claim, which had been authorita-

---

although a plea bargain might create a right not to be tried, the enforcement of such an essentially contractual right is of lesser urgency than the enforcement of the right not to be tried created by the Double Jeopardy Clause. We therefore believe that a decision that double jeopardy claims can be raised on appeal prior to trial should not be extended to other "rights not to be tried" that have different purposes and historical meanings.

tively foreclosed by the court of appeals, and Hankish immediately appealed. The trial was stayed; the court of appeals, citing *United States* v. *Lansdown*, *supra*, assumed jurisdiction over the appeal; on July 1, 1976, the court affirmed (No. 76–1334). Now Hankish has filed a petition for a writ of certiorari (No. 76–135), and his trial, for events that occurred long ago, still is blocked. It seems fair to say that in many cases even a preposterous double jeopardy claim can produce a lengthy delay for defendants who find delay advantageous.

Perhaps occasional delay might seem to be a necessary price to pay for ensuring the vindication of many just claims. Common sense indicates, however, that the reality will be the reverse: because the district courts resolve correctly the vast majority of claims presented to them,[33] the price for ensuring the pretrial vindication of a few just but erroneously rejected claims would be lengthy delay in many cases while defendants appealed from correct decisions.[34] We submit that the Court should hold that double jeopardy claims, like the other constitutional claims that arise in the course of a criminal case, must await resolution by appeal from a final judgment of conviction.

---

[33] To the extent district courts err in the resolution of double jeopardy claims, they have every incentive now to err in favor of the accused. If an indictment is erroneously dismissed the government can appeal under 18 U.S.C. 3731; district courts, knowing this and desiring to avoid unnecessary burdens on the accused and on their own crowded dockets, may well resolve close questions in favor of the accused.

[34] See Orfield, *Criminal Appeals in America* 40 n. 29, 92 (1939).

3. *Pretrial review by this Court of decisions of state courts does not provide support for pretrial review by federal courts of appeals of interlocutory decisions in federal criminal cases*

In *Alessi II* Judge Friendly expressed concern that *Heike* and similar cases had been eroded by recent decisions of this Court reviewing, under 28 U.S.C. 1257, interlocutory decisions of state courts. A typical case is *Mills* v. *Alabama*, 384 U.S. 214, 217–218, in which Mills had been indicted for the state crime of publishing a political editorial on election day. The trial court sustained a demurrer on First Amendment grounds, the Supreme Court of Alabama reversed and remanded for trial, and this Court denied the State's motion to dismiss Mills' appeal. It concluded that the decision remanding the case for trial was "final" because it had resolved the federal issue controlling the case, and further proceedings in the state court would be nothing but formalities.[35]

After thoroughly discussing these cases Judge Friendly concluded that they do not support immediate review of double jeopardy claims in federal cases (App., *infra*, pp. 15A–22A), and we think that he is right. Federal review of decisions of state *appellate* courts involves considerations quite different from those presented by the question whether there should be any appellate interruption of ongoing *trial* proceedings.

---

[35] See also *Brady* v. *Maryland*, 373 U.S. 83, 85 n. 1; *California* v. *Stewart*, 384 U.S. 436, 498 n. 71 (decided *sub nom. Miranda* v. *Arizona*); *Harris* v. *Washington*, *supra*; *Colombo* v. *New York*, 405 U.S. 9; *Turner* v. *Arkansas*, 407 U.S. 366. *Harris*, *Colombo* and *Turner* involve double jeopardy claims.

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476–487, the Court considered and analyzed the many cases that have involved review under 28 U.S.C. 1257 prior to final judgment. The analysis revealed that state criminal cases reviewed under Section 1257 have two things in common: first, the sole federal question was properly presented and had been finally decided, so that a decision on that question by this Court could terminate the litigation; second, the state courts already had countenanced pretrial review of the claims presented, so that additional review by this Court merely extended a delay that state procedure permitted. In none of them was there a prospect of piecemeal review of multiple federal claims.[36] See 420 U.S. at 477–478.

In a federal criminal case, by contrast, every question is a federal question. The prospect of piecemeal resolution of these questions therefore looms as an important consideration in deciding whether to allow interlocutory appeals. Moreover, although in the state cases the Court merely extended a delay already countenanced by state procedures,[37] the central question

[36] This is true as well of civil cases after *Cox Broadcasting* in which the Court has disposed of federal questions before final judgment. See, *e.g.*, *Fisher* v. *District Court*, 424 U.S. 382; *American Motorists Insurance Co.* v. *Starnes*, No. 74–1481, decided May 19, 1976, slip op. 5 n. 3; *City of New Orleans* v. *Dukes*, No. 74–775, decided June 25, 1976.

[37] See generally *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558, upon which the Court relied in *Harris* v. *Washington*, *supra*. A state system of appellate review "ultimately includes the certiorari or appellate jurisdiction of this Court" (*Lefkowitz* v. *Newsome*, 420 U.S. 283, 290 n. 6), and therefore, in a very real sense, the question of the "finality" of a case and its suitability for review under Section 1257 depends upon state law; unless state law creates the beginnings of appellate review before trial, Section 1257 does not provide for a continuation. See *Costarelli* v. *Massachusetts*, 421 U.S. 193 (state rule requiring a defendant to participate in a second trial in order to obtain review of errors in the first trial); *Arceneaux* v. *Louisiana*, 376 U.S. 336 (denial of request for preliminary hearing is not "final" because state court system does not allow interlocutory review).

presented by the instant case is whether Congress has countenanced *any* pretrial review and disruption. We submit, therefore, that this Court's decisions under Section 1257 do not provide support for the court of appeals' decision to assume jurisdiction of the instant case.[38]

E. COURTS OF APPEALS DO NOT HAVE THE AUTHORITY TO RESOLVE "PENDENT" CLAIMS THAT DO NOT INVOLVE THE LOSS OF A "RIGHT NOT TO BE TRIED"

The court of appeals apparently assumed jurisdiction of the appeal in the instant case on the authority of *United States* v. *DiSilvio*, *supra*. *DiSilvio*, however, did not involve a statutory claim pendent to the double jeopardy claim. The only court of appeals that has explicitly considered whether such claims should be resolved before trial has concluded that they should not. *United States* v. *Barket*, *supra*. Yet the court of appeals here disposed of both the double jeopardy claim and the statutory claim presented by petitioners.

[38] The analog to Section 1257 in federal criminal cases is 28 U.S.C. 1254(1). Under Section 1254(1) a defendant who is convicted at trial and secures a remand by the court of appeals could seek certiorari, arguing that he was entitled to a dismissal of the indictment. But this right of review does not imply that he could have taken an interlocutory appeal *to* the court of appeals.

We submit that it erred in doing so, even if (contrary to our arguments) it had jurisdiction over petitioners' double jeopardy claim.

An order denying a motion to dismiss an indictment for failure to state an offense would not by itself be appealable. It is not a "collateral" order in any sense; indeed, it touches on the essence of the case. It may finally resolve a legal issue, but that is not enough; the "finality" justifying a pretrial appeal in a case like this one arises, if at all, not from the fact that a legal issue has been finally resolved, but from the fact that the legal issue comprises a claim, founded on the Constitution, of a right not to be tried at all. The justification for immediate resolution arises from the perceived need to ensure full enjoyment of that constitutional right. Nothing of the sort is implicated in a claim that the indictment does not state an offense.

Practical considerations strongly counsel against allowing statutory claims to ride piggyback on double jeopardy appeals. If defendants have serious statutory arguments, it would not be difficult in many cases for them to invent a claim to which the apellation "double jeopardy" could be attached. The double jeopardy argument might be frivolous, but it could bring proceedings to a standstill while the court of appeals devoted its energies to the more serious statutory arguments. There is incalculable potential for delay in appeals of this sort. They should be avoided not only because of this potential for delay, but also because they would compel the courts of appeals to devote precious resources to the resolution of claims that may become moot in light of later developments.

There is no precedent for allowing nonappealable issues to be carried piggyback on a permissible interlocutory appeal. The appeal of the denial of an interlocutory injunction, permissible under 28 U.S.C. 1292 (a), does not allow the appellant to obtain review of the district court's disposition of preliminary issues pertinent to appellant's request for damages.[39] The rationale for interlocutory review of the double jeopardy claim is that it is severable from, and in need of review before, the other issues in the case. It would make a mockery of this rationale if the double jeopardy claim were then used as a bootstrap to review the remainder of the issues in the case, as the court of appeals did here.[40]

F. IF SOME FORM OF INTERLOCUTORY APPELLATE REVIEW IS CONSIDERED NECESSARY, IT SHOULD BE BY MANDAMUS, NOT APPEAL

We have argued that the possibility of mistaken decisions by trial courts rejecting meritorious double jeopardy claims is not a sufficient reason to allow appeal in every case prior to trial. One of the underpinnings of this argument has been that an appeal on a double jeopardy claim, to be effective, must bring other

---

[39] Except insofar as those issues may be common to those that must inevitably be reached to decide the appeal relating to the injunction.

[40] *Aldinger* v. *Howard*, No. 74-6521, decided June 24, 1976, *United Mine Workers* v. *Gibbs*, 383 U.S. 715, and similar pendent jurisdiction cases have nothing to do with the problem at hand. In *Aldinger* and *Gibbs* the question to be decided was whether certain causes of action against certain parties would be heard in federal or state court; here the question is one of timing of appellate review within a single court system.

proceedings in the district court to a halt; allowing appeals therefore would produce lengthy delay in many cases in order to afford relief in a few cases where error has been committed. The Court ought not to upset the settled rule that defendants cannot take interlocutory appeals in criminal cases, but if, contrary to our arguments, the Court should conclude that double jeopardy claims cannot be reviewed effectively after trial and that immediate appellate review of some kind is necessary, it should hold that mandamus, rather than appeal, is the proper device. Mandamus might provide relief from the rejection of a valid double jeopardy claim where the error is blatant and the impending harm great; at the same time, because mandamus is a discretionary remedy, its use would not create the substantial potential for delay that inheres in appeals.

This Court's decisions concerning the availability of mandamus before trial in criminal cases look both ways. A number of decisions indicate that, where Congress has not provided for interlocutory appeal, mandamus cannot be used as a substitute means of review, for that would frustrate the Congressional plan. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90;[41] *Parr* v. *United States*, *supra*, 351 U.S. at 520–521; *Roche* v.

[41] We believe that the rationale of *Will* has been substantially undermined by the recent amendments to the Criminal Appeals Act, 18 U.S.C. 3731, which provide for interlocutory appeals by the government. Because Congress intended to afford the prosecution liberal access to appellate review in all cases except those where the Double Jeopardy Clause would bar further proceedings on remand (see *United States* v. *Wilson*, 420 U.S. 332, 336–339), it is now more appropriate than

Evaporated Milk Association, *supra*. These cases also indicate that the ultimate availability of appeal after a judgment of conviction is an independent reason why mandamus will not issue. Cf. *Kerr* v. *United States District Court*, No. 74–1023, decided June 14, 1976. Thus, these cases appear to say that mandamus will not lie both when an appeal is available and when it is not. *Roche* and *Parr* doubtless state the rule applicable to the great majority of cases; if it were otherwise, the final judgment rule would be substantially eroded.

But the rule is not absolute. Shortly after it decided *Roche*, the Court held in *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, that mandamus would issue before trial in a criminal case when the imposition of private hardship amounted to a usurpation of power. The Court acknowledged that "[i]t is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to * * * extraordinary writs as a means of review" (*Alkali Export*, *supra*, 325 U.S. at 202). This principle was tempered, however, by the holding that mandamus is available, in the court's discretion, when the district court's decision amounts

it was at the time *Will* was decided for courts of appeals to issue pretrial writs of mandamus. Such pretrial writs in criminal cases are particularly appropriate because errors in favor of the accused that produce an acquittal are unreviewable, whereas errors in favor of the prosecution can be reviewed and corrected if the case ends in a conviction.

to "not mere error but usurpation of power" (*DeBeers*, *supra*, 325 U.S. at 217).

The cases, taken together, support the principle that mandamus will lie when the district court has clearly overstepped its authority or refused to exercise the authority with which it is endowed. So, for example, if a district court refused to rule on a defendant's motion to dismiss the indictment on double jeopardy grounds, mandamus would lie to compel the court to act. If the district judge were known to the court of appeals as one who regularly rejected double jeopardy claims regardless of their merits, mandamus would perhaps lie to correct this abuse. See *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, affirming the issuance of mandamus forbidding a district judge to refer an antitrust case to a master; both the court of appeals and this Court relied upon the fact that the district judge routinely abused his power by making such references. Moreover, mandamus would lie if the district court acted where it had no power to do so. *Schlagenhauf* v. *Holder*, 379 U.S. 104, is one of many examples.[42]

[42] See also, *e.g.*, *United States* v. *Norton*, 539 F.2d 1082 (C.A. 5) (mandamus is appropriate where a district judge reduces sentence after the time provided by Fed. R. Crim. P. 35); *Board of Parole* v. *Merhige*, 487 F.2d 25 (C.A. 4), certiorari denied, 417 U.S. 918 (mandamus is appropriate where a district judge grants a discovery order of a sort completely beyond his power); *United States* v. *Werker*, 535 F.2d 198 (C.A. 2), certiorari denied *sub nom. Santos-Figueroa* v. *United States*, November 1, 1976 (No. 76–5270) (mandamus is appropriate where a district judge engages in plea bargaining with a defendant in violation of Fed. R. Crim. P. 11). The central feature in these cases and others like them is that the judge, acting beyond the scope of his power, took an action that would be viewed by no other means; whether his particular decision was right or wrong thus was irrelevant to the threshold question of the power to entertain a mandamus petition.

The most difficult questions arise where, as here, the district judge has both the power and the duty to rule upon the motion, and the defendant alleges that the judge erred, not that he acted arbitrarily or outside the legitimate bounds of his power. We think that a claim of simple error—such as that made here—is insufficient to permit the issuance of mandamus. A party seeking pretrial mandamus in a criminal case must show more: flagrant abuse of power, callous disregard for the applicable principles, or action where there is no power to act. This is the standard articulated in *LaBuy* and *Schlagenhauf* for the use of "supervisory" mandamus, and we believe that it should be applied in criminal cases as well as civil. Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595 (1973).

The availability of mandamus under this standard would allow courts of appeals to correct abuses by district judges who reject seemingly meritorious double jeopardy claims without giving them serious consideration. This would go far to alleviate the concern that the denial of a right of interlocutory appeal would expose defendants to unfair or vexatious treatment, but it would at the same time avoid unnecessary review by piecemeal and prevent extensive delays in cases free from error. As Judge Friendly wrote in *Alessi II* (App., *infra*, p. 22A), "a court of appeals has the opportunity of utilizing 'supervisory' or 'advisory' man-

damus to correct any truly egregious error of a district court * * *. This resource, usable on a selective basis, * * * dictates against broad indentation of the final decision rule, especially in criminal cases."

II

A RETRIAL OF PETITIONERS WOULD NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

If the Court agrees with our submission that appellate resolution of petitioners' double jeopardy arguments must await review of the entire case, should petitioners be convicted, then it should vacate the judgment of the court of appeals and remand this case for trial. If, however, it concludes that pretrial appeals are permissible, at least as to double jeopardy claims, then it must consider whether a second trial of petitioners would violate the Double Jeopardy Clause. We accordingly turn to a discussion of petitioners' double jeopardy arguments.

The one-count indictment charged petitioners with violating the Hobbs Act, 18 U.S.C. 1951(a). It charged (A. 5–6):

> That * * * Larry Starks, Clarence Louis Starks, Alonzo Robinson, Donald Everett Abney, and Merrill Albert Ferguson, did unlawfully and willfully conspire and attempt to obstruct, delay and affect [interstate] commerce * * * by extortion * * *, that is to say, by then and there attempting to obtain from * * * Ulysses J. Rice * * * money * * * to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate commerce, the attempted obtaining of said property * * * being then intended to be accomplished * * * by the wrongful use * * * of * * * threatened force, violence and fear * * *.

Petitioners argued before trial that the indictment is duplicitous because it charges both conspiracy and attempt. The prosecutor argued that it is not duplicitous, and the trial court directed the government to file a bill of particulars setting forth (515 F.2d at 117, emphasis added by court of appeals):

> A statement as to whether the government intends to proceed to prove either a conspiracy, or an attempt to obstruct, delay and affect commerce and the movement of articles and commodities therein by extortion, *or both*.

The prosecutor responded that he intended to prove both offenses. Defense counsel asked the court to require the prosecutor to elect between the charges, but the court declined (A. 8; 515 F.2d at 117).

The trial court recognized that the indictment charges two crimes, and it accordingly required the prosecutor to prove both of them. It instructed the jury that it could find any of petitioners guilty only if it concluded beyond a reasonable doubt that he had both conspired to extort and committed attempted extortion.[43]

---

[43] The court instructed the jury:

> [T]he defendants are charged not with the so-called substantive offense itself but rather with a conspiracy and attempt to obstruct, delay and affect interstate commerce by extortion. If the jury should find beyond a reasonable doubt that there was a conspiracy and an attempt to extort money from Mr. Rice, the natural and probable consequences of which conspiracy and attempt, if successfully carried out, would be to obstruct, delay and adversely affect interstate commerce in any way or degree, the offense charged in the indictment of conspiracy and attempt would be complete, and the jury could properly convict all defendants found beyond a reasonable doubt

Following a conference regarding counsel's objections to the charge, the trial court reinforced these instructions by telling the jury, immediately before it retired to deliberate (10 Tr. 60):

> I would also point out that in the indictment it is charged that the defendants were guilty of both conspiracy and an attempt and the essential elements of both of those offenses must be proved before any defendant could be found guilty.

The jury returned a verdict of guilty as to each petitioner, but it acquitted Merrill Ferguson and Clarence Starks.

> to be members of the conspiracy and attempt. [A. 25–26.]
>
> * * * * *
>
> [I]t becomes necessary for me to define both "conspiracy" and "attempt," since the defendants are charged not with the substantive offense itself of obstructing, delaying or adversely affecting interstate commerce by extortion but rather a conspiracy and attempt so to do.
>
> Therefore, I shall define to you all of the requisites of both a conspiracy and an attempt, because all of these requisites must be found before the jury could find any defendant guilty. [A. 26.]
>
> * * * * *
>
> In this case the defendants are charged with a conspiracy and attempt, both as integral and essential parts of the single charge. [A. 32.]
>
> * * * * *
>
> [T]his charge being a single conspiracy and attempt to obstruct, delay and adversely or harmfully affect interstate commerce by extortion does not require proof that the conspiracy was successful, or that its unlawful objectives were obtained. The offense charged may be proved even though the conspiracy and attempt failed because the extortion was not successfully carried out. [A. 35.]

1. *The instructions to the jury precluded any chance that petitioners were implicitly acquitted at the first trial*

The court of appeals agreed with petitioners that the indictment is duplicitous. 515 F. 2d at 115–118. Because the court reversed petitioners' convictions on another ground, it did not consider whether the vice of duplicity had been eliminated by the trial court's instructions. In order to avoid any problem of duplicity in the next trial, it instructed the district court to require the prosecutor to elect between the conspiracy and attempt charges (*id.* at 118, 125).

On remand the prosecutor elected to proceed on the conspiracy charge. Petitioners contend, however, that a new trial even on the single charge is prohibited by the Double Jeopardy Clause. They argue that because the indictment improperly charged two offenses, the general verdict of guilty does not disclose the offense of which they were convicted. They appear to suggest that the jury may, contrary to the judge's instructions, have convicted them of attempt and implicitly acquitted them of conspiracy; this, they say, precludes a second trial for conspiracy.

We do not doubt that, in many cases, duplicitous indictments lead to ambiguous verdicts because of the possibility that the jury may have believed the defendants to be guilty of one crime but not the other. Another vice of duplicity, noted by the court of appeals, is that "there is no way of knowing with a general verdict on two separate offenses joined in a single count whether the jury was unanimous with respect to

either" (515 F. 2d at 117). But the instructions to the jury in this case foreclosed either possibility.

The prosecutor elected before trial to assume the burden of proving both conspiracy and attempt; he did so, presenting evidence of a conspiracy as well as a concerted attempt on the part of petitioners over a two-month period to extort money from Ulysses Rice. The court's instructions to the jury unambiguously informed it that it could convict only if it concluded that the prosecution had proved all the elements of both crimes.[44] Indeed, this was stressed to the jury immedi-

[44] As part of its instruction on conspiracy, the court told the jury "that there [must] be proof beyond a reasonable doubt of the commission by one or more of the conspirators of an overt act, that is an act knowingly committed in an effort to accomplish some object or purpose of the conspiracy" (A. 32), and it added that "[a]n attempt would, of course, constitute an overt act provided you find that there is a conspiracy, and an attempt to obstruct, delay or adversely affect interstate commerce by extortion" (*ibid.*). Petitioners argue (Br. 11–12) that this portion of the instructions made it possible for the jury to convict without finding that each defendant was guilty of attempted extortion. This argument depends upon an implausible reading of a straightforward and correct instruction. As the trial court correctly noted (A. 37), if one member of the conspiracy committed attempted extortion during the course of the conspiracy and in execution of the unlawful agreement, that attempt is attributable as a substantive offense to all other members of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640. Moreover, even if this portion of the instruction muddies the verdict as to attempt, petitioners' double jeopardy claim is hardly advanced. The government has elected to proceed on the conspiracy charge, and speculation concerning what the jury may have found (or failed to find) regarding the attempt charge is irrelevant. Finally, if the attempted extortion properly can be viewed as simply an overt act of the conspiracy, the indictment would not be duplicitous, and the foundation on which petitioners rest their claim would be removed.

ately before it retired to deliberate. It cannot be assumed that the jury failed to follow these instructions (*Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 367), and its verdict of guilty therefore establishes that it found each petitioner guilty of both conspiracy and attempted extortion. There was no implied acquittal, or even the possibility of one, on the conspiracy count.

2. *A second trial is permissible after a conviction has been set aside on appeal.*

a. Although, in our view, the instructions to the jury adequately guarded against an ambiguous verdict, another more general argument also supports the proposition that a second trial is permissible under the Double Jeopardy Clause. Petitioners appealed and prevailed; their convictions were set aside at their behest. A second trial therefore is proper under a principle that has been "a well-established part of our constitutional jurisprudence" (*United States* v. *Tateo*, 377 U.S. 463, 465) for nearly a century.

> At least since 1896, when *United States* v. *Ball*, 163 U.S. 662, was decided, it has been settled that [the Double Jeopardy Clause] imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.

North Carolina v. *Pearce*, 395 U.S. 711, 719–720 (footnote omitted). See also *Ludwig* v. *Massachusetts*, No. 75–377, decided June 30, 1976, slip op. 11–13; *United States* v. *Dinitz*, 424 U.S. 600, 610 n. 13; *United States* v. *Ewell*, 383 U.S. 116, 121–125; *Forman* v. *United States*, 361 U.S. 416; *Bryan* v. *United States*, 338 U.S. 552; *Stroud* v. *United States*, 251 U.S. 15, 16–18; *Murphy* v. *Massachusetts*, 177 U.S. 155, 158–159.

The Court explained the rationale of this rule in *United States* v. *Tateo*, *supra*, 377 U.S. at 466:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Even if it were open to petitioners to argue that the jury may not have convicted them of conspiracy, this speculative possibility is hardly sufficient to override the soundness of the rule permitting retrial following reversal of a conviction.[45]

Petitioners' claim here relates to the jury's verdict, but it is not different in kind from any other assertion that, "but for" the error, the defendants might have been acquitted. Indeed, the possibility of harm to the defense and effect upon the verdict is the reason why some practices at trial are "error." The rule for which

[45] The problem of ambiguity in the jury's verdict is quite unlike the situation presented by *Green* v. *United States*, 355 U.S. 184, where it could be said with certainty that the jury had not convicted the defendant of murder in the first degree.

petitioners contend would immunize from further prosecution any defendant whose first trial was infected with error that might have affected the verdict—in other words, all error sufficiently serious to call for reversal. Fed. R. Crim. P. 52(a). That would require the Court to overturn *Tateo*, *Ball*, and many other cases. We submit that there is no reason to do so.

b. Petitioners attempt to avoid *Ball* and *Tateo* by arguing that this case is marked by "prosecutorial overreaching" that alone is responsible for the need for a second trial (Br. 10, 13–14). We submit, however, that there is no more "prosecutorial overreaching" here than in any other case in which the prosecutor makes a mistake that leads to reversal on appeal. In this case the prosecutor believed that the indictment was not duplicitous, and the district court did not require an election. The district court instructed the jury that it could convict only if it concluded that petitioners were guilty of both conspiracy and attempt; these instructions may have been unnecessarily favorable to petitioners.

The grand jury could have returned an indictment in two counts, one charging conspiracy and the other charging attempt. If petitioners had been convicted on both counts, they could have received consecutive sentences. *Callanan* v. *United States*, 364 U.S. 587. Because the two charges were (erroneously) included in one count, petitioners were spared exposure to this risk. The government's decision to prove both offenses simply increased its own burden of proof.[46] Nothing

[46] The indictment did not create the risk that petitioners in the future could be indicted and tried for either conspiracy or

that happened here was done in bad faith to harass or prejudice petitioners,[47] and a second trial therefore is permissible.

III

THE INDICTMENT CHARGES AN OFFENSE UNDER THE HOBBS ACT

We have argued at pages 49–51, *supra*, that even if a double jeopardy claim can be raised by appeal prior to trial, the special considerations pertaining to double jeopardy contentions are absent with regard to any other assertions that defendants may make, and that arguments "pendent" to a double jeopardy claim should await appellate resolution in the ordinary course. If the Court should disagree with that submission, however, it will be necessary to pass upon petitioners' argument that the indictment, redacted to charge only conspiracy, now charges no offense at all.

Petitioners are arguing nothing less than that duplicity cannot be cured by an election to proceed on one of the charges. This is so in their case, they say, because the redacted indictment could be read to charge that attempted extortion was the object of the conspiracy. This is insufficient, they continue, because the Hobbs Act does not prohibit a conspiracy to commit attempted extortion. They also contend that the indictment is insufficient to charge an offense because it does not allege that the defendants entered into an agreement to violate the law.[48]

---

attempt. Had the conviction not been overturned at petitioners' behest, it would have been a bar to further criminal proceedings for either offense. *Green* v. *United States*, *supra*, 355 U.S. at 188; *Trono* v. *United States*, 199 U.S. 521, 533.

[47] Petitioners' assertion (Br. 10, 14) that the government acted in bad faith is groundless. The prosecutors had no incentive to offer petitioners two opportunities to be acquitted and every incentive to conduct the first trial so that a conviction, if obtained, would be upheld on appeal.

1. The indictment, with the attempt charge omitted, alleges (A. 5–6) that petitioners

> did unlawfully and willfully conspire * * * to obstruct, delay and affect [interstate] commerce * * * by extortion * * *, that is to say, by then and there attempting to obtain * * * money [from the victim], * * * to be paid in order to continue in the business of selling alcoholic beverages contracted for and obtained in interstate commerce * * *.

The indictment adequately charges a conspiracy to commit extortion. Petitioners' reading of the indictment as charging that the object of the conspiracy was only attempted extortion—that is, as charging that the conspirators intended to fail to extort money—is implausible. To be sure, the indictment alleges not only

---

[48] Petitioners do not contend that the redaction of the duplicitous language denied them their Fifth Amendment right to be tried on an indictment properly returned by a grand jury, and such an argument would not be tenable. See, *e.g.*, *Salinger* v. *United States*, 272 U.S. 542; *United States* v. *Hall*, 536 F.2d 313, 319–320 (C.A. 10) (collecting cases), certiorari denied November 1, 1976 (Nos. 76–1 and 76–11); *United States* v. *Dawson*, 516 F.2d 796 (C.A. 9), certiorari denied, 423 U.S. 855. Although it could be argued that deletion of the duplicitous language altered the nature of the charge by allowing the prosecutor to avoid proving both conspiracy and attempt, petitioners have not done so, and neither the district court nor the court of appeals has considered such an argument. Petitioners requested the prosecufor to elect between conspiracy and attempt theories, and, as the court of appeals pointed out on the first appeal (515 F.2d at 117, footnote omitted), "requiring an election is an appropriate remedy for duplicitousness." See also Fed. R. Crim. P. 7(d).

that the unlawful object of the combination was extortion, but also that acts amounting to an attempted extortion were performed in furtherance of the conspiracy. But the nature of the conspiracy as an unlawful combination for the purpose of committing extortion is neither defeated nor improperly described because its contemplated object was not fully achieved. It is proper to charge that the object of a conspiracy was extortion and that, in furtherance of this unlawful object, the conspirators attempted to extort money from the victim.

2. Also insubstantial is petitioners' further contention that the indictment is fatally deficient for failure to allege agreement.[49] The indictment charges that petitioners "did unlawfully and willfully conspire." That is sufficient to allege agreement. "A natural reading of these words * * * is nothing more than an agreement to engage in the prohibited conduct." *United States* v. *Feola*, 420 U.S. 671, 687. Because every conspiracy is an agreement, petitioners in effect urge that the indictment is insufficient because it is not redundant. The use of the term "conspire" fairly informs petitioners of the charge against which they must defend, and it would enable them to plead an acquittal or conviction to bar future prosecutions for the same

[49] Petitioners apparently have abandoned their contention (Pet. 7–8) that the indictment is insufficient because it does not allege that the defendants conspired *together*. In any event, there would be nothing to such an argument. *Wright* v. *United States*, *infra*. A common sense reading of the indictment leads to the conclusion that it is alleging that they conspired with each other, and not each with one or more unnamed third persons.

offense. No more is required. *Hamling* v. *United States*, 418 U.S. 87, 117–119; *Hagner* v. *United States*, 285 U.S. 427, 431. See also *United States* v. *Armour & Co.*, 137 F.2d 269, 270–271 (C.A. 10); *Wright* v. *United States*, 108 Fed. 805, 809–811 (C.A. 5), certiorari denied, 181 U.S. 620.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with directions to dismiss the appeal for want of jurisdiction. If the Court reaches the merits, it should affirm the judgment of the court of appeals.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

SHIRLEY BACCUS-LOBEL,
MARC PHILIP RICHMAN,
Attorneys.

NOVEMBER 1976.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1197, 1198—September Term, 1975.

(Argued June 9, 1976 Decided July 7, 1976.)

Docket Nos. 76-1189, 76-3025

UNITED STATES OF AMERICA,

Appellee,

v.

VIRGIL ALESSI,

Defendant-Appellant.

Before:

FRIENDLY, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, which, after an evidentiary hearing directed by this court, again denied appellant's motion to dismiss an indictment against him on the ground that prosecution would violate a plea-bargaining agreement made in the Eastern District of New York.

Affirmed.

NANCY ROSNER, Esq., New York, N.Y., *for Appellant.*

JAMES P. LAVIN, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney, Southern District of New York, and Frederick T. Davis, Assistant United States Attorney, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

On or about June 30, 1972, a witness disappeared. The ensuing events have come to plague the district courts for the Eastern and Southern Districts of New York and this court as well. We now have the third case this year in which this court must consider the bearing of what then happened.

The witness was a central figure in the case developed by Eastern District Strike Force Attorney James Druker to prove the allegations embodied in Eastern District indictment 72 Cr. 473. That indictment charged, among other matters, a conspiracy to violate the federal narcotics laws encompassing appellant, Virgil Alessi, and Vincent Papa, Anthony Passero, Frank D'Amato, Anthony Loria, Sr., and others; and also charged the just-named defendants with engaging in a continuing criminal enterprise as defined in 21 U.S.C. § 848. At the time of the disappearance, Druker was in the midst of plea bargaining the charges; the "package" he proposed to achieve had been written down and apparently cleared with his superiors in Washington. With his prime witness lost, Druker's case was greatly weakened, and he proceeded, over the next two months, to negotiate a bargain more favorable to the defendants. Agreement between Druker and the several attorneys who represented Vincent Papa, one of whom also represented ap-

pellant Alessi, was finally reached on August 18, 1972. No contemporaneous written evidence of the terms of the bargain exists; what they in fact were is a matter best deferred for the moment.

Sometime between August 18 and September 5, Druker learned of information that had been supplied to the Eastern District Strike Force by Joseph Ragusa, which potentially implicated Papa in yet further illegal narcotics activities. Papa was not informed of this, and ignorant of it he pleaded guilty, on September 5, 1972, to the conspiracy charge and also to a pending tax evasion information.

On October 2, 1972, Virgil Alessi waived indictment and he, too, pleaded guilty—to a one count conspiracy charge contained in a superseding information; 72 Cr. 473 was dismissed as to him. Appellant's counsel contends that this format was used so that it would be clear that this plea acted to bar a pending prosecution in Nassau County. Appellant also waived his pre-sentence report, and was sentenced at the time of his plea. Before accepting the plea, the district court asked Alessi if anyone had promised him anything to induce it; Alessi answered that no one had. However, when the judge indicated that he would be willing to sentence Alessi to "15 years without batting an eye," it rapidly became evident that the truth was otherwise. The upshot was that, on Druker's recommendation, Alessi received a five-year suspended sentence with a mandatory three-year special parole. Appellant now claims that the consideration for his plea included certain representations by Druker, which, it is contended, prevent the prosecution in the present case from going forward.

On two previous occasions we have considered these promises of the summer of 1972. The first case, decided on April 2 of this year, was *United States* v. *Papa*, —— F. 2d ——, slip op. 2977, an appeal from Papa's convictions in the Southern District of New York for conspiracy

to violate and a substantive violation of the narcotics laws. Papa's most important contentions were that the "Southern District conspiracy" was the same as the "Eastern District conspiracy" to which he had previously pleaded, and therefore that the Southern District prosecution on that charge was violative of his right not to be twice placed in jeopardy; and that the Southern District case, based in good part on the testimony of Joseph Ragusa, violated the bargain. This court affirmed the convictions, holding as to the first point that after all the facts were in, Papa had failed to show the claimed identity of the conspiracies; and as to the second point that even if the Eastern District U.S. Attorney's Office would have been bound not to prosecute crimes discovered by use of Ragusa's information, the bargain did not reach so far as to preclude the Southern District prosecution which had been developed entirely independently.

The second case, even more recently decided, was *United States* v. *Alessi*, —— F.2d ——, slip op. 3881 (May 26, 1976) (*Alessi I*), which involved the same appellant as the present case. That appeal, like this one, was from a pre-trial order: the challenge was to a district court decision denying Alessi's claim that the 1972 promises were broad enough to prevent an Eastern District prosecution for tax evasion during the years in which the "Eastern District conspiracy" had been in operation. This court affirmed, holding that the pre-trial order was appealable but that whatever crimes were covered by the bargain, a crime as distant from the conspiracy as tax evasion was not.

We come now to this case. By indictment filed on August 4, 1975, Anthony Passero, Lawrence Iarossi, and others were indicted by a grand jury in the Southern District of New York for conspiracy to violate the narcotics laws; Vincent Papa, Virgil Alessi, and Frank D'Amato were among the named but unindicted co-conspirators. Alessi

was indicted on five substantive counts which, as supplemented by the bill of particulars, all charge him as an aider and abettor for delivering, at locations in Long Island City, and others parts of Queens, various quantities of heroin to one Anthony Manfredonia, which Manfredonia then took to the Southern District for distribution to others. The Government states that if this case does finally come to trial, it will introduce evidence showing that Alessi "was well aware" that the heroin "was being transported to and concealed, possessed and distributed to others in the Southern District of New York." The Government also contends, and appellant offers nothing in refutation, that insofar as the indictment names Alessi it is based on information supplied by Manfredonia, a witness developed entirely by the Southern District, and, as Druker stated in an affidavit, unknown to him in 1972. Its brief states that "[n]o witness or evidence used in the obtaining of this indictment was obtained from prosecutors in the Eastern District." Finally, the Government contends, although this point is indeed disputed, that Druker's representations were by their own terms not binding on the Southern District.

The essence of appellant's claim, which is based on *Santobello* v. *New York*, 404 U.S. 257 (1971), was succinctly stated by the trial court as follows:

> According to Alessi, the plea-bargain agreement provided that Alessi would not be prosecuted with respect to any overt acts committed during the course of the Eastern District conspiracy which might constitute a substantive violation of the narcotics laws. Alessi contends that the present indictment violates the plea-bargain agreement and that his prosecution would therefore amount to a denial of due process.

Trial was scheduled to begin on January 20, 1976. In November 1975, appellant moved to dismiss the indictment on the ground just indicated. Judge Bonsal, on December 29, reserved decision until the conclusion of the trial, when he would have the benefit of the evidence that had been introduced as to the true nature of the crimes charged and would conduct an evidentiary hearing. Alessi appealed, and the Government moved to dismiss the appeal. Without deciding the question of appealability, a panel of this court, on January 19, issued a writ of mandamus (*Alessi II*) directing the trial court either to sever Alessi from the trial and await its evidence, or to hold an evidentiary hearing and determine the motion prior to trial; a short unprinted opinion was filed the next day. Following issuance of the writ, also on January 19, a brief hearing was held before Judge Bonsal. Appellant's counsel urged a severance, in part on the ground that the district court should await the results of the appeal in *Papa,* which had been argued but not yet decided. Appellant also agreed to waive any claim of denial of a speedy trial that might arise out of the attendant delay. Judge Bonsal, apparently impressed by these points and also by the fact that Alessi was not a defendant to the conspiracy count, granted the severance.

Trial as to seven of the other defendants, under the title *United States* v. *Iarossi,* began on January 20 and ended on February 4, with a verdict against all defendants on all counts. A notice of appeal was filed, and the case is now docketed in our court, #76-1132, with argument presently scheduled to be heard in the middle of September.

Meanwhile the pretrial proceedings regarding defendant Alessi went on. On February 11, 1976, Judge Bonsal held another short hearing. Appellant's counsel and the prosecutor agreed that there was no further factual material to be introduced: the issue was submitted on the basis of

the record developed in *Papa,* in yet another case concerning Papa and Alessi that had come before the Eastern District in October, 1975, and in *Iarossi.* Four days after our decision in *Papa,* on April 6, 1976, Judge Bonsal denied the motion to dismiss the indictment. He supported his decision on two grounds: first, the conspiracy charged in the current indictment was not the same as that charged and pleaded to in the Eastern District, and therefore the substantive crimes with which Alessi was charged were not "overt acts" of that conspiracy; and second, the plea bargain was not intended to cover crimes developed by independent investigations undertaken by U.S. Attorney's Offices outside of the Eastern District. Alessi appealed from this decision on April 13, 1976.

Shortly thereafter, Alessi's trial was scheduled for May 4. On April 29, he petitioned for yet a second writ of mandamus, to halt the trial pending determination of the appeal. On May 3, a temporary stay was issued, and on May 6 a writ followed, staying the trial and setting an expedited briefing schedule. We heard oral argument on June 9.[1]

I. *Appealability*

Understandably distressed that it is now in this court for the second time, with Alessi's trial severed from that of his co-defendants and delayed for many months and with another appeal in prospect if he is tried and convicted (in which he might argue that developments at trial

---

1 This case came to us docketed under the dual caption "Virgil Alessi v. Honorable Dudley B. Bonsal" and "United States of America v. Virgil Alessi." As we understand it, Alessi is presently pursuing only an appeal, and is not seeking to invoke the extraordinary writ for yet a third time; apparently the first caption is the result of the April 29 request for relief and is not now applicable. In any event we would decline to issue mandamus under the principle announced in *Kaufman and Withington* v. *Edelstein,* —— F.2d —— (2 Cir. 1976), slip opinions 3287, 3298-99.

had demonstrated that our decision on the merits here was wrong), the Government naturally wonders how all this is consistent with *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). In an opinion by Mr. Justice Frankfurter, the Court there said among other things that Congress from the very beginning has, by forbidding "piecemeal disposition on appeal of what for practical purposes is a single controversy," "set itself against enfeebling judicial administration"; that "[t]o be effective, judicial administration must not be leaden-footed"; and that "[t]hese considerations of policy are especially compelling in the administration of criminal justice," since "encouragement of delay is fatal to the vindication of the criminal law." See also *DiBella* v. *United States*, 369 U.S. 121, 124, 126 (1962); *Kerr* v. *U.S. District Court*, 44 U.S.L.W. 4838, 4841 (U.S. June 14, 1976). Alarmed at what has happened by the recent advance of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), into the criminal field under the seductive guise that a defendant is entitled under some circumstances to be protected from an unlawful trial and not simply from an unlawful conviction, and fearful that still worse may befall in the future, the Government asks that we reconsider our interpretation of the "final decision" rule of 28 U.S.C. § 1291 in *United States* v. *Beckerman*, 516 F.2d 905, 906-07 (2 Cir. 1975), or at least limit the damage to the precise situation there presented—a second trial admittedly for the same offense following one alleged to have been unlawfully aborted by the trial judge, and to decline to follow the recent decision on another of Alessi's due process appeals, *United States* v. *Alessi I*, *supra*. Since, as in *Beckerman* and *Alessi I*, we agree with the Government on the merits and there is a fair possibility that the issue may soon be settled, *Abney* v. *United States*, No. 75-6521, *certiorari granted*, 44 U.S.L.W. 3719 (U.S. June 14, 1976); see also *Barket* v. *United States*, No. 75-

1280, *petition for certiorari pending*,[2] we think it would be more useful instead of seeking *en banc* reconsideration of *Beckerman* and/or *Alessi I*,[3] to make our own analysis but not now to challenge prior precedent in this court. Such an analysis is particularly desirable because the Government has recently called to our attention two Supreme Court decisions, *Rankin* v. *The State*, 78 U.S. (11 Wall.) 380 (1870), and *Heike* v. *United States*, 217 U.S. 423, 433 (1910), seemingly favorable to it, only the latter of which it cited in *Beckerman*, and there only in summary fashion, and neither of which was cited to the Fourth Circuit in *United States* v. *Lansdown*, 460 F.2d 164 (1972), on which *Beckerman* heavily relied. On the other hand, neither party has cited more recent Supreme Court decisions which might seem to look the other way, although we conclude they in fact do not.

In *Rankin* v. *The State*, *supra*, a defendant, charged with murder in the courts of Tennessee, pleaded in bar an

2 These petitions were brought by defendants to review decisions of the Eighth Circuit in *United States* v. *Barket*, 530 F.2d 181 (1975), and of the Third Circuit in *United States* v. *Abney* (unprinted judgment order), which entertained defendants' pretrial appeals on the ground of double jeopardy but ruled for the Government on the merits. In both cases the Government has urged that the defendants' petitions be granted in order to have the Court resolve the question of appealability.

In *Beckerman* and *Alessi I* in this circuit, the Government also prevailed on the merits and therefore was not in a position to seek certiorari from the ruling as to appealability. Perhaps for the same reason it did not seek consideration of the appealability issue *en banc*, as we would have to do if we followed its suggestion.

3 We do not agree with the statement in *Alessi I*, slip op. at 3884, that the appealability of an order refusing to dismiss an indictment as violating a plea bargain was "implicitly" affirmed by the first issuance of mandamus in this case. Apart from the possible effect of this court's rule § 0.23 that disposition by summary order "shall not be cited or otherwise used in unrelated cases before this or any other court," the order granting mandamus held only that Alessi was entitled to an evidentiary hearing—not that he was entitled to appeal from an adverse decision rendered thereafter.

acquittal by a general court-martial for the same crime. After the lower court had sustained the plea and entered a judgment of acquittal, the Supreme Court of Tennessee reversed and remanded for a trial on the merits. The Supreme Court dismissed the writ of error on the ground that the state court judgment was not final.[4]

Next came *Heike* v. *United States*, 217 U.S. 423 (1910). Charged with violations of the customs laws and with a conspiracy to defraud the United States of its revenues, Heike filed a plea in bar claiming immunity from prosecution because he had been compelled to testify on the same subject matter before a grand jury. After the trial court had directed the jury to deny the plea, it permitted Heike to plead over, and set a date for trial. A Justice of the Supreme Court allowed a writ of error to review the denial of the plea in bar, and the United States moved to dismiss the writ. The Court held the writ was not within § 5 of the Court of Appeals Act of 1891, 26 Stat. 826, 827-28, allowing direct appeal to the Supreme Court, "In

4 Mr. Justice Bradley's opinion is short enough to be quoted in full:

> The difficulty with the case, as brought before us, is that the judgment was not a final one in the case. This court, under the 25th section of the Judiciary Act, can only take cognizance of final judgments of the State courts. And although the court has been liberal in it's construction of the statute as to what judgments are final, yet the judgment in this case cannot be deemed such by any reasonable stretch of construction. It is a rule in criminal law *in favorem vitae*, in capital cases, that when a special plea in bar is found against the prisoner, either upon issue tried by a jury, or upon a point of law decided by the court, he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty." And this is the effect of the judgment of reversal rendered by the Supreme Court of Tennessee in this case; so that in no sense can that judgment be deemed a final one. The case must go back and be tried upon its merits, and final judgment must be rendered before this court can take jurisdiction. If after that it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency. Writ of error dismissed.

any case that involves the construction or application of the Constitution of the United States." Construing this provision as embodying the final judgment rule, the Court, 217 U.S. at 429, deemed it certain that the judgment below did "not dispose of the whole matter litigated in this proceeding. . . ." The Court continued, 217 U.S. at 430:

> As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. It may be that upon trial the defendant will be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case. It is true that in a certain sense an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory rulings and orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error. The purpose of the statute is to give a review in one proceeding after final judgment of matters in controversy in any given case. Any contrary construction of the Court of Appeals Act may involve the necessity of examining successive appeals or writs of error in the same case, instead of awaiting, as has been the practice since the beginning of the Government, for one review after a final judgment, disposing of all controversies in that case between the parties.

Turning to Heike's contention that the immunity statute provided that "No person shall be *prosecuted* or be subjected to any penalty or forfeiture" (emphasis supplied) and that the Government would not be keeping its promise if it proceeded beyond indictment, the Court said, 217 U.S. at 431:

> But we are of opinion that the statute does not intend to secure to a person making such a plea immunity from prosecution, but to provide him with a shield against successful prosecution, available to him as a defense, and that when this defense is improperly overruled it may be a basis for the reversal of a final judgment against him. Such promise of immunity has not changed the Federal system of appellate procedure, which is not affected by the immunity statute, nor does the immunity operate to give a right of review upon any other than final judgments.

Still more to the point, the Court said, by way of supporting argument, 217 U.S. at 432:

> The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment.

The Court then went on to refer to and quote from *Rankin* v. *The State*, *supra*. All this is especially significant in that the statement in *United States* v. *Ball* that "The prohibition [of the double jeopardy clause] is not against being twice punished, but against being twice put in jeopardy", 163 U.S. 662, 669 (1896)—the cornerstone of our recent decision in *Beckerman* upholding review before the second trial—must have been fully as well known to the members of the *Heike* court, several of whom had participated in *Ball*, as it is to judges of the 1970's.

The arrival of *Cohen* on the scene would not seem, at first blush, to affect the holding or the considered dictum in *Heike*. For the cornerstone of the *Cohen* decision was

that the order of the district court refusing to apply New Jersey's statute requiring security for costs in stockholders' derivative actions

> did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.

337 U.S. at 546. An order denying a plea of double jeopardy, or denying a claim that an indictment violates the terms of a plea bargain, *is* merged in the final judgment and can be reviewed on an appeal therefrom—except on the view that the purposes of the double jeopardy and due process clauses can only be served by preventing prosecution (beyond the stage of indictment) rather than conviction, a view rejected by *Heike* by its holding with respect to the immunity statute and by dictum with respect to double jeopardy.

The Court's first, long its only, application of *Cohen* in a criminal case, *Stack* v. *Boyle*, 342 U.S. 1 (1951), did not presage any significant impairment of the final judgment rule. The order there held to have been appealable under *Cohen* was a refusal to reduce bail pending trial. The rationale was thus explained in the concurring opinion of Mr. Justice Jackson, who should have known the meaning of *Cohen* if anyone did, 342 U.S. at 12:

> While only a sentence constitutes a final *judgment* in a criminal case, *Berman* v. *United States*, 302 U.S. 211, 212, it is a final *decision* that Congress has made reviewable. 28 U. S. C. § 1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. The purpose

of the finality requirement is to avoid piecemeal disposition of the basic controversy in a single case "where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . . .'" *Cobbledick* v. *United States*, 309 U.S. 323, 326. But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all. The relation of an order fixing bail to final judgment in a criminal case is analogous to an order determining the right to security in a civil proceeding. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, or other interlocutory orders reviewable under 28 U. S. C. § 1292.

Strain began to appear with *Parr* v. *United States*, 351 U.S. 513 (1956). A defendant indicted for federal income tax evasion secured a transfer of his case to another division of the same district because of local prejudice. Before trial began, the Government reindicted the defendant in another district and moved to dismiss the initial indictment, which motion was granted. A bare majority of the Supreme Court held the dismissal was not appealable; any review had to await the trial and verdict on the second indictment.

Mr. Justice Harlan, writing for the Court, offered two complementary rationales. If the initial indictment was "viewed in isolation" from the second indictment, then appeal was unavailable because the defendant was not aggrieved by dismissal of the first indictment. If instead the two indictments were considered as part of the same prosecution, then the second indictment was "as it were a superseding indictment, [and] petitioner has not yet been

tried, much less convicted and sentenced." 351 U.S. at 518. Parr had not succeeded in bringing himself within the *Cohen* exception. The appeal did not concern matters "outside the stream of the main action," or matters which would "not be subject to effective review as part of the final judgment." The burden of a possibly needless trial was not sufficient reason for instant appealability.

> True, the petitioner will have to hazard a trial under the [second] indictment before he can get a review of whether he should have been tried in Laredo under the [first] indictment, but "bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States* [309 U.S. at 325].

351 U.S. at 519-20.

All this was in full conformity with *Heike* which the majority cited with approval, 351 U.S. at 517. The strain was manifested by the opinion of the Chief Justice speaking for four Justices in dissent:

> We countenance plain harassment if we require Parr to be tried under what may turn out to be an invalid indictment at Austin before he can obtain appellate review of dismissal of the Laredo case. Should this occur, Parr would have been required to undergo two trials, one at Austin and another at Laredo. Section 1291 should not be construed so as to bring about such a result.

351 U.S. at 523.

Passing the cases denying review of decisions to suppress or not to suppress evidence at trial, *Carroll* v. *United States*, 354 U.S. 394 (1957), and *DiBella* v. *United States*, *supra*, 369 U.S. 121, we arrive at the cryptic footnote to

Mr. Justice Douglas' opinion in *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963). Because of the prosecution's suppression of material favorable to the defense, the Supreme Court of Maryland had reversed the judgment convicting Brady and remanded for a new trial limited, however, to the issue of punishment. The discussion of the Supreme Court's appellate jurisdiction was as follows:

> Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U. S. C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman* v. *United States*, 302 U. S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 547) that "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U. S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson*, 326 U.S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent* v. *Texas*, 318 U. S. 418, 421-422. Cf. *Local No. 488* v. *Curry*, 371 U. S. 542, 549.

373 U.S. at 85 n.1.

Next came *Mills* v. *Alabama*, 384 U.S. 214 (1966). Mills had been charged with violating an Alabama statute which forbade electioneering on election day, by publishing an

editorial. The trial court sustained a demurrer based on First Amendment grounds, the Supreme Court of Alabama reversed and remanded for trial, and Mills appealed to the Supreme Court. Mr. Justice Black denied the State's motion to dismiss for want of a final judgmgent, saying, 384 U.S. at 217-18:

> This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. (Footnote omitted.)

In *California* v. *Stewart*, 384 U.S. 436 (1966), one of the four cases decided under the title of *Miranda* v. *Arizona*, the State had obtained certiorari from a judgment of its Supreme Court which had reversed a conviction because of the admission of a confession allegedly taken in violation of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Stewart's

motion to dismiss for lack of a final judgment was denied; a footnote, 384 U.S. at 498 n.71, stated:

> After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal.[5] Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903.

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), Mr. Justice White endeavored to rationalize where these decisions and similar ones in civil cases had left the final judgment rule of 28 U.S.C. § 1257. He began with a general statement:

> [A]s the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc.* v. *Johnson*, [326 U.S. 120] at 124, as well as precipitate interference with state litigation.

420 U.S. at 477-78 (footnotes omitted). He then fitted the cases into four categories. The first category, of which *Mills* was cited as an example, consisted of cases "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." 420 U.S. at 479. The second category, of which *Brady* was an example, consisted of cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." 420 U.S. at 480. A third category, of which *Stewart* was an example, included cases "where the federal claim has been finally decided, . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . . [I]n these cases, if the party seeking interim review ultimately prevails [on remand] on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. The fourth category consisted of

> those situations where the federal issue has been finally decided in the state courts with further proceedings

5 Hart & Wechsler, The Federal Courts and the Federal System (1973 ed.), raise the question, p. 628:

> Is this not so in every criminal case in which a state appellate court orders a new trial on federal grounds?

> pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83. It was this fourth category in which *Cox Broadcasting Corp.* apparently was deemed to fall. Finality was found not simply because "if the Georgia court erroneously upheld the statute, there should be no trial at all" but because even if the defendant prevailed at trial on non-federal grounds, "there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments." 420 U.S. at 485.

There is one characteristic common to all four categories of these § 1257 cases which is missing in appeals to a federal court of appeals from an order of a district court. This is that, as said in Mr. Justice White's general statement, *supra*, 420 U.S. at 477-78 "[i]n most, if not all, of the cases in these categories, these additional proceedings [on remand] would not require the decision of other federal questions that might also require review by the Court at a later date. . . ." In *Brady*, *Mills* and *Stewart*, the

Supreme Court was presented with the opportunity to review, albeit at a formally interlocutory stage, the only question ever likely to be put to it, whatever the stage of the proceedings.[6] It is the one-time character of Supreme Court review of state cases that seems critical to all four of Justice White's categories. The situation is quite different with respect to federal criminal prosecutions, where the entire law defining the offense and the trial procedures is federal. If the trial occurs, it is likely that a number of "federal" questions will later be presented to the court of appeals for review—even perhaps the identical question with additional factual background —so there is not the same convenience in an appellate court's addressing any single federal question before passing upon all. Also, when acting under § 1257 with respect to cases that have been remanded for trial by a state supreme court, the Court is dealing with cases which have already passed once through the state hierarchy and can reach the Supreme Court after the remand only by again passing through a state trial court and one appellate court or often two. In contrast, dismissal of an appeal from a pretrial order of a federal district court simply means that the trial will occur and, unless the appellant wins, the court of appeals will then hear a multi-faceted appeal by him in any event. In short we conclude that the *Brady-Mills-Stewart* line of cases and their civil counterparts under 28 U.S.C. § 1257 rest on considerations peculiar to Supreme Court review of final judgments of state courts and are not authoritative on the application of *Cohen* to a court of appeals review of a pretrial order of a district court in a federal criminal case.[7] In addition to the dif-

6 This clearly was true in *Brady* and *Mills*—not quite so clearly but probably true in *Stewart*.

7 In saying this we have not overlooked what might be taken as a suggestion in Mr. Justice Jackson's concurring opinion in *Stack* v. *Boyle*,

ferentiating considerations apparent in Mr. Justice White's discussion in *Cox Broadcasting Corp.* and those we have noted, a court of appeals has the opportunity of utilizing "supervisory" or "advisory" mandamus to correct any truly egregious error of a district court, see *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964); *Kerr* v. *U.S. District Court, supra*, 44 U.S.L.W. at 4841; *American Express Warehousing, Ltd.* v. *Transmerica Ins. Co.*, 380 F.2d 277, 282-83 (2 Cir. 1967); *Kaufman and Withington* v. *Edelstein, supra* note 1, at 3298-99; Note, Supervisory and Advisory Mandamus under the All Writs Act, 86 Harv. L. Rev. 595 (1973).[8] This resource, usable on a selective basis, also dictates against broad indentation of the final decision rule, especially in criminal cases.

The decisions of the courts of appeals present a varied picture. This court's first encounter with a problem similar to that here presented was *United States* v. *Ford*, 237 F.2d 57, 67 (2 Cir. 1956), vacated as moot, 355 U.S. 38 (1957). *Ford* was a tax evasion case with separate counts for each

---

supra, 342 U.S. at 12, that the words "final judgment" may call for more than the words "final decision." We think all the Justice was saying was that it is not fatal to an appeal under 28 U.S.C. § 1291 that a judgment is not formally final, a condition which in a criminal case would be met only by the sentence, see *Berman* v. *United States*, 302 U.S. 211, 212 (1937), if the other requirements of *Cohen* were satisfied. In *Parr* v. *United States, supra*, 351 U.S. at 518, Mr. Justice Harlan treated the two terms "judgment" and "decision" as interchangeable. As pointed out by Mr. Justice Rehnquist in *Cox Broadcasting Corp.* v. *Cohen, supra*, 420 U.S. 502-03 n.3, statutes providing for review of decisions of federal courts had used the term "final judgment or decree" until the Evarts Act of March 3, 1891, creating the courts of appeals, 26 Stat. 826, and the legislative history affords no explanation for the Senate's changing these words, which were in the House bill, to "final decision."

8 Whether or not the All Writs statute, 28 U.S.C. § 1651, empowers the Supreme Court to issue mandamus to a state court, such power has been most sparingly used. See Hart & Wechsler, *supra*, at 298, 458.

of five years. The jury found Ford guilty for 1948, 1949 and 1950 and not guilty for 1951. It was unable to agree as to 1947; the trial judge first directed a verdict of acquittal and then vacated this. After affirming the convictions, the court dealt briefly with the claim that a retrial on the 1947 count would constitute double jeopardy. Judge Hincks, speaking also for Chief Judge Clark and Judge Frank, said, 237 F.2d at 67:

> Since the order [vacating the directed verdict of acquittal] is interlocutory and the defendant has not yet been placed in jeopardy thereunder, the issue is not currently appealable and the pending appeal as to Count 1 must accordingly be dismissed.[9]

Next came the decision of the Fifth Circuit in *Gilmore* v. *United States*, 264 F.2d 44, cert. denied, 359 U.S. 994 (1959). There a defendant, after reversal of his conviction on a first trial, went through a second trial resulting in a hung jury, and then sought to appeal a denial of his motion for acquittal on the ground that the evidence had been insufficient for submission to the jury. The court dismissed the appeal for lack of jurisdiction. Writing for a panel that included Chief Judge Hutcheson and Judge Wisdom, Judge John R. Brown, after recounting the argument of Gilmore's counsel, which relied on the statement

---

9 Along with the Government we are unable to agree with the statement in *United States* v. *Beckerman, supra*, 516 F.2d at 906, that *Ford's* "precedential authority has been undermined since the opinion was later vacated as moot" as a result of Ford's subsequent death. In so vacating a judgment the Supreme Court refrains from passing on its merits, *Durham* v. *United States*, 401 U.S. 481, 483 n. (1971) (per curiam); the judgment loses its status as *res judicata* but not its persuasive power as a precedent in this court. We likewise fail to see the basis for the statement in *Beckerman* that the issue was "only obliquely considered" in *Ford*, although review of the briefs does indicate that the court did not have the benefit of thorough briefing, with no party discussing the effect of *Cohen*.

in *United States* v. *Ball, supra,* 163 U.S. at 669, to which we have previously referred, and commenting on the bearing of *Bryan* v. *United States*, 338 U.S. 552 (1950), had this to say:

> [E]ven if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. There are many instances in which it is ultimately determined that constitutional rights have been violated. But the nature of the asserted right, i.e., a constitutional one, does not distinguish appellate review of any such question from the assertion of other rights, whether statutory or common law, or from a procedural rule. At least so long as a criminal case is pending, review of such matters, as for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. This is so even though, at the end of that trial, or an appeal from the judgment of conviction, it is ultimately determined[7] that the violation of the constitutional right compels an acquittal. When that is the outcome, the individual accused may claim in a very real sense to have been subjected to a trial that ought never to have taken place. Congress might, as it has recently done in a very limited way for civil matters, 28 U.S.C.A. § 1292(b), provide for interlocutory appeals to test such questions prior to trial and a final judgment in the traditional sense. Until Congress does so, the individual affected is witness to the fact that, "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Cobbledick v. United States, 1940, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783.
>
> The Constitutional right, or the asserted violation of it, does not bridge the gap of appellate statutory jurisdiction. Nor, for like reasons, does it, through some reverse process, expand the term "final decision" into something which, contrary to a long-settled Congressional policy, amounts in actuality to piecemeal review.

264 F.2d at 46-47 (footnote omitted).

Movement in the opposite direction began with the Fourth Circuit's decision in *United States* v. *Lansdown, supra,* 460 F.2d 164. The case afforded about as strong an inducement for allowing appeal from an interlocutory order, under *Cohen's* exception to the finality rule, as could be imagined. The court apparently thought the Government's case had been weak and the defendant's strong and that the jury ultimately would have reached a verdict of acquittal. After having decided that the judge improperly ended the jury's long deliberations, the court considered the question of appealability and held *Cohen* to be applicable. Starting with the much quoted statement in *United States* v. *Ball, supra,* it reasoned, 460 F.2d at 171:

> Even if an appellate court reverses the conviction in a second trial on the grounds of double jeopardy, a defendant has still not been afforded the full protection of the fifth amendment since he has been subjected to the embarrassment, expense, anxiety and insecurity involved in the second trial. If an individual is to be provided the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial. (Footnotes omitted).

Even so, the court added in a footnote, 460 F.2d at 171 n.8:

> Our holding is limited to the narrow facts and circumstances of this case. Where the charges in the first and second trial differ and a double jeopardy argument rests on a claim that certain facts required for a conviction in the second trial were previously determined in an earlier trial, review must wait until the completion of the second trial.[10]

In addition to *United States* v. *Beckerman*, *supra*, 516 F.2d at 906-07, *Lansdown* has attracted two more adherents, *United States* v. *DiSilvio*, 520 F.2d 247, 248 n.2a (3 Cir.), *cert. denied*, 96 S. Ct. 447 (1975); *United States* v. *Barket*, 530 F.2d 181 (8 Cir. 1975), *cert. pending*, No. 75-1280.

The Fifth Circuit, however, has remained unconvinced. *United States* v. *Bailey*, 512 F.2d 833 (5 Cir.), *cert. dismissed under Rule 60*, 96 S. Ct. 578 (1975), was an appeal from denial of a motion to dismiss an indictment after a trial claimed to have been illegally aborted by the judge. Dismissing the appeal, the court repeated Judge (now Chief Judge) Brown's analysis in *Gilmore* and expressly rejected the reasoning of *Lansdown*.

Subsequent cases demonstrate the impracticability of cabining *Landsdown* and *Beckerman* to the precise facts there presented. In *United States* v. *Alessi I*, *supra*, this court found that the rationale of *Beckerman* necessarily comprehended a due process claim of failure "to fulfill an earlier promise not to prosecute" for other crimes made in consideration of a guilty plea. The opinion did not explain why the case stood differently from the immunity from

10 The *Lansdown* court did not say whether its decision would apply in another variation of double jeopardy, namely, a case where the defendant claims but the prosecution denies that the second prosecution is for the same offense.

prosecution promised in *Heike*. Perhaps the panel concluded that *Heike* had been eviscerated by *Cohen*, but Mr. Justice Harlan did not think so, even as late as *United States* v. *Parr*, *supra*, 351 U.S. at 517, 519. The further onrush of *Cohen* in the criminal area is illustrated by *United States* v. *MacDonald*, 531 F.2d 196 (4 Cir. 1976), where the *Lansdown* rationale was extended to a claim of denial of speedy trial.[11] Indeed if *Lansdown* were sound, why not? Here too the constitutional guarantee is not solely against conviction but against the trauma of having to await or undergo a trial long after arrest. See *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). Yet the consistent practice in this circuit has been that denials of motions to dismiss indictments for lack of a speedy trial are reviewed on appeal from convictions, if these should occur.[12] We have little doubt that, as the Government argues, once *Cohen* is construed to have created a "right not to be tried" exception to the final decision rule in criminal cases, it will be hard to limit the claims for such review which counsel will advance.[13] This is not just an "alarming specter,"

11 Once again in *MacDonald*, as before in *Lansdown*, *supra*, 460 F.2d at 171 n.8, the Fourth Circuit panel characterized its holding as having a narrow effect, 531 F.2d at 199:

> Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after final judgment. It is the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal.

This would seem to us to be rather a reason for effecting pretrial review by mandamus; we find nothing in *Cohen* that conditions its applicability on the merit of a particular appeal.

12 Decisions such as *Lansdown*, *Beckerman*, *Alessi I* and *MacDonald* also raise the question whether a defendant *must* appeal within 10 days of the order by which he is aggrieved rather than await the outcome of the trial. See Hart & Wechsler, The Federal Courts and the Federal System (2d ed. 1973) 1554-1555, see also 629.

13 One that readily comes to mind is a claim of too speedy a trial, compare *Stans* v. *Gagliardi*, 485 F.2d 1290 (2 Cir. 1973). If an appeal

as the Government put it in *Lansdown*, 460 F.2d at 172; in four short years the "specter" has acquired a number of earthly embodiments. If the point were open in this circuit, we would cast our lot in favor of the continuing vitality of *Heike* v. *United States*, *supra*, 217 U.S. 423, and the final decision rule in criminal cases as applied in the Fifth Circuit, and would dismiss this appeal for want of jurisdiction. However, we are constrained by contrary precedent in this circuit and, because of the possibility of a decision at the next term of the Supreme Court, will not seek *en banc* reconsideration.

II. *The Merits*

Appellant's argument that this prosecution should be halted runs as follows: The terms of the plea bargain struck on August 18, 1972, covered defendant Alessi as well as defendant Papa. The bargain included, among other matters, an agreement not to prosecute, as a substantive crime, anything which could have been included as an overt act in the Eastern District conspiracy alleged in 72 Cr. 473. However, the argument runs, the conspiracy charged in the present Southern District indictment is the same conspiracy as that previously alleged in the Eastern District, and the substantive crimes with which appellant is taxed are the "overt acts" or "pieces" of the Southern District conspiracy. Therefore the crimes presently charged fall within the scope of the bargain. Furthermore, appellant contends, the plea bargain, as here relevant, was intended to extend as far as the Southern District U.S. Attorney's Office, and, as a matter of law, the Eastern District had the power to bind the Southern District in this fashion even though no approval from the Southern District had been sought or received. Since Alessi's plea to the superseding information was intended to give him the same protection as if he had pleaded to the Eastern District indictment, and since he pleaded in reliance on the promises here sought to be enforced, appellant concludes that the present indictment, as to him, should be dismissed.[14]

While not necessarily conceding the other matters, the Government, on appeal, has joined issue primarily on two of these points. The Government's main position is that the plea bargain should not be construed to prevent the Southern District U.S. Attorney's Office from prosecuting any crime, other than those that would fall under a double jeopardy ban, so long as the prosecution was independently developed. In the alternative, the Government contends that Druker could not, by his independent actions, bind the Southern District.

---

lies from an order directing a trial for which a defendant has become unprepared because too much time has elapsed, why not from an order directing a trial for which the defendant has not had enough time to prepare? Why not also in the many cases where a defendant claims he is being unconstitutionally forced to trial in the absence of counsel of his own choosing?

14 Appellant's brief also raises a direct double jeopardy claim, although the point was not pressed at oral argument. The contention apparently is that Alessi is being charged as an aider and abettor not because he "actually knew of Manfredonia's subsequent transfers" but because they were "the reasonably foreseeable consequences of his act"; that this theory of liability is the same as that used to hold a conspirator for the acts of his co-conspirators; and that, accordingly, on this view of intent aiding and abetting is the same crime as conspiracy. We have no need to consider the legal merits of this argument because the factual predicate is lacking. The Government states that it will prove that Alessi "knew some of Manfredonia's customers" and that Alessi had "a continuing, active stake" in the sales. The Government is, of course, quite right in stating that appellant cannot assume that the evidence against him will be identical to that introduced against the already tried defendants in *Iarossi*. The Government's offer of proof seems sufficient to support a conviction for aiding and abetting which is distinct from the crime of conspiracy, see, e.g., *United States* v. *Bommarito*, 524 F.2d 140, 145 (2 Cir. 1975). In any case it seems that if there is a question here, it is an issue whether the evidence will be sufficient to prove the crime charged—something which of course cannot now be considered—and not a matter of double jeopardy.

We find it unnecessary to go further than the terms of the bargain. In developing this, both sides rely almost entirely on the evidence introduced in a hearing held by the district court in *United States* v. *Papa, supra*, where two witnesses testified: Druker and one of Papa's attorneys. Indeed, the Government contends that the issue on the merits has already been decided by the interpretation of this evidence given in the *Papa* opinion, and cites the following language, —— F.2d ——, slip op. at 2995-96:

> The representations made by Druker related expressly and by necessary implication exclusively to Eastern District investigations and prosecutions. The terms of the bargain did not extend to matters under investigation elsewhere. Papa's attorneys' principal concern was to ensure that their client would not be re-indicted on "pieces" of the Eastern District conspiracy. Druker promised that the bargain immunized Papa from any further prosecution on the basis of any future information he received related to the Eastern District conspiracy. Papa's attorneys secured a promise from Druker that there would be no additional prosecution stemming from matters presently under investigation in the Eastern District. Druker specifically refused to grant appellant *"carte blanche"* immunity as to all his past criminal conduct, and carefully noted that Papa was still subject to prosecution on any unrelated criminal activity. Never once was Druker asked to inquire about investigations in the Southern District nor was he asked to include Southern District crimes in the plea negotiations. Indeed, when Druker was queried by Papa's attorneys as to the money seized from Papa in February, 1972, he responded: "It's in the Southern District's bailiwick and I don't know what if anything they are going to do with it."

Appellant's counsel argues that, when read in context, this language does not settle the matter. Her contention is that Druker made two separate promises: first, "that there would be no additional prosecution stemming from matters presently under investigation in the Eastern District"; second, that Papa and Alessi "would not be re-indicted on 'pieces' of the Eastern District conspiracy." Only the first of these promises, it is claimed, was limited to prosecutions developed or carried out by the Eastern District; the second one, the promise applicable to this case, was intended to bind the Government as a whole. The *Papa* opinion, it is said, is not to the contrary because what was being decided was whether Ragusa, whose existence was known to Druker before the plea was entered, could subsequently be used as a witness in the Southern District trial for crimes arising from a distinct conspiracy, given that he had been located by means of an independent investigation. As the court stated in the sentence immediately following the portion just quoted, "[a]lthough the Ragusa matter did not relate to a 'piece' of the Eastern District conspiracy, it did concern a matter under investigation in the Eastern District at the time the plea was entered."

While the quoted portions of the *Papa* opinion could be read in this fashion, we are not persuaded that they were so intended. The blanket statement that "[t]he representations made by Druker related expressly and by necessary implication exclusively to Eastern District investigations and prosecutions" is most naturally read as relating to the discussion of the entire consideration offered by Druker, including both of what appellant claims were two distinct promises. Insofar as the opinion does draw the distinction appellant wishes to make, it does not do so until after the whole bargain has been described and characterized. However, even though appellant's counsel

indicated her desire, in the court below, to have Alessi's case await the results of the then-upcoming decision in *Papa*, we would not hold that opinion's construction of the bargain to be conclusive against appellant, were we not convinced that the underlying testimony supports the interpretation of the bargain for which the Government contends.

It is true that there are segments of Druker's testimony which, read in isolation, appear to support appellant's contention that one of the promises was not limited to Eastern District prosecutions. For example:

> Q. [Papa's Attorney] So that Mr. Papa was promised as well, then, in return for his plea, overt acts in furtherance of this conspiracy would not give rise to subsequent individual prosecutions?
>
> A. [Druker] That's correct.

Or, to be a bit more concrete, Druker said:

> I advised, for example, that if somewhere down the chain of the ladder it turned out that Mr. Loria had been selling heroin to five or six people who were not named in my conspiracy but that it developed or became clear that this was as a result of the same chain from Mr. Papa on up, that he would be covered on this. Anything to do with that conspiracy.

However, in context these statements must fairly be read to delineate only the scope of the crimes covered. Druker never once directly testified that the promise or promises he had made were intended to cover any prosecution by other than the Eastern District Office; nor did Papa's attorney. To the contrary, Druker testified, as the *Papa* opinion points out, that he never checked with the Southern District as to their investigations; that he never asked

the Southern District to join in the bargain; that he was never asked by Papa's lawyers to check with the Southern District; and that this was true even though Papa's attorneys had been told that the nearly $1 million seized from Papa at the time of his arrest in the Bronx was in the "Southern District's bailiwick" and, for all Druker knew, was the subject of investigation there. We can only conclude that insofar as the plea bargain can be understood to confer an immunity from narcotics law prosecutions greater than that given by the double jeopardy clause, it was not in the contemplation of either side that anyone outside of the Eastern District U.S. Attorney's or Strike Force Offices was bound. While this gave the defendants less than complete protection, their attorneys were doubtless more interested in nailing down the substantial concessions they had already achieved than in having further inquiry made. From Druker's point of view the limitation is certainly intelligible; he had good cause for not wanting to bind another Office which he had not consulted. We would, of course, have a different case if there were evidence to show that the Eastern District was attempting to evade its own obligations by transferring a prosecution across the East River; but there is none. Since we find nothing in this prosecution that offends the plea bargain, the order below is

Affirmed.

FEINBERG, *Circuit Judge* (concurring):

On the appealability issue, I concur in the result. On the merits, I join in the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RONALD DENNIS YOUNG,
Defendant-Appellant.

No. 75-3102
OPINION

Appeal from the United States District Court for the Southern District of California

Decided October 19, 1976

Before: CHOY and WALLACE, *Circuit Judges*, and RICHEY,* *District Judge.*

RICHEY, District Judge:

The question presented on this appeal is whether a district court's denial of a motion to dismiss an indictment is a final and appealable order within the meaning of 28 D.E.O. 57297 where the challenge to the indictment is founded on a claim of double jeopardy. Because we answer in the negative, we dismiss the appeal for lack of jurisdiction and do not reach the merits of appellant's constitutional claim.

In 1974 appellant was convicted in federal district court of conspiracy to possess with intent to distribute, and possession with intent to distribute, cocaine under 21 U.S.C. §§ 241(a)(1) and 246. In June 1975 appellant filed a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motion was granted after an evidentiary hearing at which

* The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

a former co-defendant testified in a manner tending to exonerate appellant. Appellant's second trial commenced on July 29, 1975. During the retrial, appellant filed two motions for judgment of acquittal. Each was denied. The case was submitted to the jury August 1. After the jury had deliberated for almost two days, the court polled the jurors as to the likelihood of reaching a unanimous verdict. The jurors responded that there was no reasonable probability of reaching a verdict if given additional time. Without objection from counsel, the court declared a mistrial. Retrial was scheduled for August 20. On August 12, appellant moved to dismiss the indictment on the ground that further prosecution of the case would constitute a violation of his fifth amendment guarantee against double jeopardy. After consideration of appellant's arguments, the district court denied the motion. Appellant thereafter filed notice of appeal from the orders of the district court denying the motions for acquittal and the motion to dismiss the indictment. He alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1291.

Title 28 U.S.C. § 1291 provides for jurisdiction "of appeals from all final decisions of the district courts of the United States." In the context of a mistrial, the denial of a motion for acquittal is not a final order. *United States v. Carey*, 475 F.2d 1019, 1021 (9th Cir. 1973); *United States v. Kaufman*, 311 F.2d 695, 698–699 (2d Cir. 1963). Therefore this Court is without jurisdiction to review the district court's denial of the motions for acquittal until final judgment is rendered. Similarly, as a general rule the denial of a motion to dismiss an indictment is not a final order within the

meaning of the statute. *People of the Territory of Guam v. Lefever*, 454 F.2d 290 (9th Cir. 1972); *Kyle v. United States*, 211 F.2d 912 (9th Cir. 1954). Thus, were it not for appellant's claim of double jeopardy, this case could be disposed of by memorandum. However, several circuits recently have carved out an exception to the general rule of finality where a claim of former jeopardy is raised. Since the issue is one of first impression in this Circuit, we examine the question at some length.

Appellate review is not a constitutional entitlement. It is a purely statutory right, and to avail oneself of that right, one must satisfy the terms of the statute. Under 28 U.S.C. § 1291, the essential condition of review is that there be a "final decision" in the case. This prerequisite of finality is founded on the long-standing policy of avoidance of piecemeal review: "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right of a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick v. United States*, 309 U.S. 323, 324–325 (1940). *See also DiBella v. United States*, 369 U.S. 121 (1962).

The district court's denial of appellant's motion to dismiss was not final in the sense of terminating the

litigation, for "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). Appellant, however, argues that his claim of double jeopardy removes the case from the general rule of finality. Relying on the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its adaptation in *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972), he contends that the motion to dismiss the indictment involved issues collateral to the main action and that to deny appeal at this time will preclude effective review of his constitutional claim. For reasons stated below, we find *Cohen* inapplicable to the instant situation.

In *Cohen* the Supreme Court recognized an exception to the rule of "finality" for orders made during the course of litigation which related to matters outside the main cause of action and which would not be subject to effective review as part of final judgment in the action. There the district court had denied defendants' request that plaintiffs file an expense bond in a shareholders' derivative suit as required under state law. In effect, the district court order had finally determined the rights at stake. Moreover, the order "did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment." 337 U.S. at 546.

The alleged right to the posting of a security bond was "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case

is adjudicated." 337 U.S. at 546. The Court held the district court's order appealable because it was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 547.

In subsequent decisions the Court has made clear that the *Cohen* doctrine should be limited to those few situations where the order appealed from is truly collateral to the main cause of action and not subject to review on appeal from a final judgment. In *Parr v. United States*, 351 U.S. 513 (1965), the Court rejected appellant's argument that the *Cohen* rationale should be applied to allow appeal from a dismissal of an indictment. There the government had obtained a second indictment in another district and then moved for leave to dismiss the first indictment. The district court granted the motion and defendant appealed. Finding that the district court's action was a step toward final disposition of the case and would be merged in the final judgment, the Court concluded that the order in question was not appealable. 351 U.S. at 519–520.[1]

[1] The narrow applicability of *Cohen* was recently made clear in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), where the Court held appealable a district court's order imposing notice costs on the plaintiff class. The two grounds for the *Cohen* holding were set forth: (1) the order appealed from conclusively settled the rights at stake, and (2) the order concerned a collateral matter which could not be reviewed on final judgment. At 171. A decision from this Circuit further illustrates the rigorous standard imposed by *Cohen*. In *Biggins v. United States*, 205 F.2d 650 (9th Cir. 1953), we allowed appeal from an order adjudging defendant incompetent to stand trial. There we stated: "The order does not purport to merely refuse trial from day to day at the convenience of the court or for a short period of time to enable defendant to recover from a temporary upset. It is, in nature, the kind of order which would never be reviewed on direct appeal after trial." At 652. *See also Kyle v. United States*, 211 F.2d 912 (9th Cir. 1954).

The extension of the *Cohen* doctrine upon which appellant relies and which we today reject is found in *United States v. Lansdown, supra.* There the Fourth Circuit held that a district court's denial of a motion to dismiss an indictment based on a claim of double jeopardy was a final and appealable order. In the court's view, the right asserted under the fifth amendment met the criteria of the *Cohen* ruling: it was separable from the main issue of guilt or innocence; it was constitutional in nature and, thus, too important to be denied review; and it would be irreparably lost if review were not had before trial. 460 F.2d at 171. The court concluded that to provide a defendant with the full protection of the guarantee against double jeopardy, the decision as to whether jeopardy has attached must be reviewed prior to any retrial.[2] *Lansdown* has been adopted in three other circuits. *United States v. Barket*, 530 F.2d 181 (8th Cir. 1975); *United States v. DeSilvio*, 520 F.2d 247 (3d Cir. 1975); *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975).[3]

[2] We note that the court expressly narrowed the applicability of its holding "to that very small number of criminal cases in which a mistrial is declared against the wishes of the defendant." 460 F.2d at 172. Thus, on its face, the decision does not encompass the present proceedings. However, the Fourth Circuit has subsequently given the case broad application. *See United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976).

[3] In *United States v. Alessi*, —— F.2d —— (2d Cir. July 7, 1976), the court, in a lengthy discussion, expressed disagreement with the holding of *Lansdown*, but boxed to its own precedent, noting the grant of certiorari June 14, 1976, in *Abney v. United States*, —— F.2d —— (3d Cir. Feb. 9, 1976).

In *United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975), the Fifth Circuit refused to follow *Lansdown*. The court reasoned that the presence of a double jeopardy claim did not transform the trial court's interlocutory order into a final decision.

> But even if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. . . . At least so long as a criminal case is pending, review of such matters as, for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. 512 F.2d at 835, quoting from *Gilmore v. United States*, 264 F.2d 44, 46 (5th Cir. 1959).

We agree with the Fifth Circuit. Review of the district court's denial of appellant's motion to dismiss the indictment should be postponed until final judgment is obtained. Unlike the defendants' request for an expense bond in *Cohen*, appellant's claim of double jeopardy does not concern a purely collateral matter. Rather, it is a challenge to the validity of the prosecution itself. The district court's rejection of appellant's claim was a step toward final resolution of the main action. The constitutional claim will be merged in the final judgment and may be reviewed on appeal from that judgment.

In so holding, we do not overlook the unique nature of the double jeopardy guarantee as compared to other constitutional rights. Unlike a fourth amendment claim or a claim based on the guarantee against self-incrimination, the double jeopardy claim goes to the very

power of the government to bring an individual into court to answer the charge against him. *Menna v. New York*, 423 U.S. 61 (1975); *United States v. Wilson*, 420 U.S. 332 (1975); *Blackledge v. Perry*, 417 U.S. 21 (1974). Denying review at this time may subject appellant to a prosecution which the government has no right to initiate. However, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick*, *supra*, 309 U.S. at 325–326.

Moreover, denying interlocutory review of appellant's double jeopardy claim is consistent with early opinions from the Supreme Court. In *Rankin v. The State*, 78 U.S. (11 Wall.) 380 (1870), the Court held that a state court's rejection of defendant's plea of a prior acquittal for the same offense was not a final judgment and, thus, not appealable. And in *Heike v. United States*, 217 U.S. 423 (1910), the Court found non-appealable a district court's denial of defendant's plea of immunity to further prosecution.[4]

Finally, we note that the delays and disruptions

[4] In dicta the Court in *Heike* remarked that a plea of double jeopardy was likewise not appealable until final judgment. "[A] plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution. . . ." 217 U.S. 433.

caused by intermediate appeals are especially detrimental to the effective administration of the criminal law. *DiBella v. United States*, *supra*. Rather than give 28 U.S.C. § 1291 an unduly expansive interpretation, we prefer to limit aggrieved defendants to review after final judgment, or, under exceptional circumstances, to relief pursuant to the extraordinary writs.[5]

Appeal dismissed.

[5] Title 28, Rules of Appellate Procedure, Rule 21. *See, e.g.*, *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76 (2d Cir. 1974).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1976—223-111/10

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

RALPH DAVID SAMUEL, ESQUIRE
Attorney for Larry Starks
4013 Chestnut Street
Philadelphia, Pa. 19104
215-EV7-5535

THOMAS C. CARROLL, ESQUIRE
MARK D. SCHAFFER, ESQUIRE
Attorneys for Alonzo Robinson
Defender Association of Phila.
Federal Court Division
Room 904, 21 South 12th Street
Philadelphia, Pa. 19107
215-568-5200

JOEL HARVEY SLOMSKY, ESQUIRE
Attorney for Donald Abney
2616 Girard Plaza
Philadelphia, Pa. 19102
215-LO8-6188

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

I.

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment provides to defendants who claim that retrial will subject them to double jeopardy, a right to have that claim considered *on its merits* prior to the second trial?

2. Whether the Court of Appeals properly reviewed the District Court's denial of petitioners' motions to

dismiss the indictment on grounds of double jeopardy where:

a. The District Court's denial finally disposed of petitioners' claims that a second trial would subject them to Double Jeopardy in violation of their Constitutional Rights?

b. Tne District Court's incorrect assumption that it was without power to decide the Double Jeopardy claim, could have been reviewed by the Circuit Court of. Appeals under its Mandamus powers?

3. Whether this Court should review the sufficiency of the indictment in this case where the Rules provide for review and to do so will not delay the proceedings and may avoid further unnecessary litigation?

II.

SUMMARY OF ARGUMENT

The Government has challenged the jurisdiction of the Court of Appeals to pass on petitioners' claims that (1) re-trial would violate the Double Jeopardy Clause of the Federal Constitution, and (2) their indictments should be dismissed for failure to state a claim. Petitioners' believe the Third Circuit properly heard this case, and that this Court therefore should consider the merits previously briefed.

A. This Court has thrice held denials of double jeopardy claims final and reviewable before re-trial. *E.g.*, *Harris v. Washington*, 404 U.S. 55, 56 (1971). Such final decisions are of course reviewable by the appropriate Circuit Court of Appeals. 28 U.S.C. §1291. Claims founded on the Double Jeopardy Clause can be vindicated only if made, and, if necessary, reviewed

before re-trial, for the Clause protects against the second, illegal trial itself. *E.g.*, *United States v. Ball*, 163 U.S. 662, 669 (1896). As Mr. Justice Frankfurter pointed out, an order entered before conviction and sentencing which, if erroneous, would destroy the constitutional right, must be considered final and appealable. *Cobbledick v. United States*, 309 U.S. 323, 328-29 (1940). *Accord*, *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951). Application of this doctrine to allow an appeal here preserves intact prior restrictions on appealability. The propriety of an appeal also follows from the satisfaction of the criteria for finality set forth in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949).

B. Even if an appeal should be held unavailable to petitioners, this Court's jurisdiction remains unimpaired, for the Third Circuit could have properly heard the merits under its mandamus powers.

A court of appeals has the "naked power" to issue such a writ, where it could entertain an appeal at some stage of the proceedings. *E.g.*, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957). And when presented with an improperly filed appeal, courts of appeals have commonly acted as though mandamus were requested. *E.g.*, *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950) (L. Hand, J.).

Petitioners' case easily meets the traditional criteria for invoking the mandamus power. The trial judge here believed that petitioners had a "serious" double jeopardy claim, but refused to consider it because he erroneously assumed the Third Circuit had pre-empted his doing so. Such an abdication of jurisdiction is correctable by mandamus. *E.g.*, *Roche v. Evaporated Milk Association*, 319 U.S. 21, 31 (1943). Further, mandamus traditionally lies where there is no other adequate means of correcting a "failure of justice." *Rex v. Barker*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824

(1762). As with actions unconstitutionally removed from a jury's scrutiny, the unconstitutional imposition of a second criminal trial, absent a right of appeal, can be cured only through mandamus. To wait upon final judgement here would offer petitioners no more that the vindication of a right already dead.

C. Once this Court has assumed jurisdiction of petitioners' double joepardy claim, it should also consider the sufficiency of petitioners' indictment.

A federal appellate court with jurisdiction of an appeal on one question may consider another issue if it would result in dismissing the complaint and terminating the litigation. *Deckert v. Independence Shares Corporation*, 311 U.S. 282, 287 (1940). Here, if petitioners' indictment is insufficient, it must be dismissed. In *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964), this Court considered an independently unreviewable question together with a question properly before it—even though the resolution of the former issue could not completely terminate the litigation. Where the decision of crucial "pendent" issues could materially advance the litigation—and here the litigation would terminate—the policy against piecemeal appeals requires their review.

III.

ARGUMENT

A. The Order of The District Court Dismissing Petitioners' Plea of Double Jeopardy is a "Final Decision" and Appealable Before Re-trial.

The jurisdictional question raised by respondent is whether the order of the trial judge overruling

petitioners' pleas of double jeopardy was a "final decision" and hence appealable to the Court of Appeals before petitioners' allegedly illegal second trial. 28 U.S.C. §1291. The Third Circuit below followed its own case and those of three other circuits in allowing the appeal.[1] Two circuits disagree.[2]

This Court has thrice held that denials of claims of former jeopardy are final before the second trial. *Harris v. Washington*, 404 U.S. 55, 56 (1971); *Colombo v. New York*, 405 U.S. 9 (1972); *Turner v. Arkansas*, 407 U.S. 366 (1972). In all three cases this Court considered the merits of double jeopardy claims brought here before trial under 28 U.S.C. §1257, which permits review only of "final judgments or decrees" of state courts.[3] In Harris this Court stated:

> Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question of whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. §1257.

404 U.S. at 56 (emphasis in original).[4]

This statement recognizes the obvious: The right of citizens not to be twice jeopardized can only be protected by allowing claims upon it to be made and, if necessary, reviewed before retrial. If petitioners must wait until after trial to obtain review of their double jeopardy plea, this right will have been forfeited.

Of course, the Double Jeopardy Clause protects not only against double conviction and punishment, or conviction and punishment after acquittal, but against the second, illegal trial itself: "The prohibition is not against being twice punished, but against being twice put in jeopardy." *United States v. Ball*, 163 U.S. 662, 669 (1896). *Accord, United States v. Dinitz*, 96 S. Ct.

1075, 1079 (1976); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.); *Green v. United States*, 355 U.S. 184, 187-88 (1957). The citizen's freedom from trial twice imposed was deeply rooted in the Anglo-American tradition long before Ball:

> The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

Ex parte Lange, 85 U.S. (18 Wall.) 163, 169 (Oct. 1873 term), *citing*[4] *Blackstone's Commentaries* 315; *see Lange, supra* at 178.

Mr. Justice Frankfurter, in *Cobbledick v. United States*, 309 U.S. 373, 328-29 (1940) decisively demonstrated that an order which, if erroneous, would destroy a constitutional right of a party before that party has been convicted and sentenced must be considered final and appealable. The Justice discussed *Perlman v. United States*, 247 U.S. 7 (1918):

> There, exhibits owned by Perlman and impounded in court during a patent suite were . . . directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. The petition was denied and Perlman sought review here. The United States claimed that the action of the district court was "not final" but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman "powerless to avert the mischief of the order . . ." 247 U.S. at 13. . . . To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. *Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.*

309 U.S. at 328-29 (footnote omitted emphasis supplied). Similarly, in *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951), denial of a motion to reduce unconstitutionally high bail was held appealable before trial. Otherwise the right to reasonable bail would have been lost forever. *Cf.* 9 *J. Moore Federal Practice* ¶110.10 at 134 (an order which "effectively end[s] . . . the whole federal claim or right asserted" should be appealable, citing *Stack*).[5]

The rule urged by petitioners is a direct application, not an extension, of prior appealability doctrine. *Perlman*, *Stack*, and the case at bar are unusual in that the basic right to be protected is threatened with extinction before final conviction. Other cases, however, will remain unappealable.[6]

The government argues that denial of a right asserted under the Double Jeopardy Clause is not final under the doctrine of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949). Under Cohen, a decision which does not completely dispose of a case is final if it appears to fall in that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause of action itself to require that appellate consideration be deferred until the whole case is adjudicated. The government asserts that a double jeopardy claim is not collateral to the main cause of conviction: the defendant can protect his right not to be doubly punished under the Clause by post-conviction appeal.

To hold this, however, would be to overrule the entire line of cases from *Ex parte Lange and United States v. Dinitz*, all *supra*, and to hold that the Double Jeopardy Clause does not protect against being twice tried for the same offense. The assertion of this right cannot merge into a judgment upon retrial: the retrial destroys it. That petitioners' claim under the clause is collateral to the main cause of action here was demonstrated both in *Harris*, quoted *supra*, and *United States v. Lansdown*, 460 F.2d 164, 171 (4th Cir. 1972):

> First, defendant's right is under the fifth amendment and it is separable from, and collateral to, the main cause of action which is whether he is innocent or guilty of the crimes charged. Second, the right claimed is a constitutional one and, as such, it is too important to be denied review. Finally, if review is not had now, the right claimed—to be free from being twice forced to stand trial for the same offense—will be irreparably lost.

Of course, the final judgment rule generally governs appeals in the federal courts, particularly in criminal prosecutions. *DiBella v. United States*, 369 U.S. 121, 126 (1962). Yet the statement, "Every statutory exception [to finalty] is addressed either in terms or by necessary operation solely to civil actions," *id.*, does not mean that no order in a criminal case can ever be appealed before judgment of conviction and sentence. As demonstrated above, petitioners here in fact meet the finality requirement for appeal under §1291, and need not fit themselves into any statutory exception.[7] Were the *DiBella* language read to forbid all presentence appeals in criminal cases, review could not have been had in either *Perlman v. United States*, *supra*, or *Stack v. Boyle*, *supra*, which was specifically approved in *DiBella*, 369 U.S. at 126. *Cf. Mills v. Alabama*, 384

U.S. 214, 217-18 (1966) (appeal of controlling constitutional question answered by state court before trial taken as final under §1257); *Harris v. Washington*, *Colombo v. New York*, and *Turner v. Arkansas*, all *supra* (double jeopardy cases).

B. Absent The Right of Appeal, The Court Below Had Jurisdiction Pursuant to its Mandamus Powers

The Government challenges this Court's jurisdiction to hear petitioners' claim of double jeopardy, arguing that an appeal to the Court of Appeals was not an available remedy. As noted above, we disagree. But even if the Government were correct in its contention that an appeal did not lie, its conclusion that this Court lacks power to grant relief does not follow.

Assuming arguendo the unavailability of appeal, the Third Circuit should have reached the merits of the constitutional claim (as it did) by treating petitioners' notice of appeal as an application for a writ of mandamus. The conditions upon which the availability of the extraordinary writ depend are satisfied in this case if this Court finds petitioners' appeal inappropriate.

It is, of course, plain under the All Writs Act that a court of appeals has the "naked power" to issue such a writ where it could "at some stage of the . . . proceedings" entertain an appeal. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957). *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966).[9]

Moreover, as Judge Learned Hand observed in *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950),

> [I]f we should have jurisdiction to issue the writ, had the plaintiff applied for it at the time

> when it appealed, we think that we ought to grant it now, ignoring what is at best only a matter of form; and for that reason we hold we are free to treat the appeal as a petition for mandamus.[10]

The point has particular force where, as here, petitioners, in seeking relief by way of interlocutory appeal rather than mandamus, were simply following the law of the circuit as expressed in *United States v. DiSilvio*, 520 F.2d 247 (3d Cir.), *cert. denied*, 423 U.S. 1015 (1975).[11]

Petitioners' case easily meets the accepted criteria for invoking the mandamus power. First, the district judge's order denying petitioners' double jeopardy motion rested on his conclusion that he was without authority to consider its merit. Thus, his decision was based *solely* on the previous Third Circuit opinion involving petitioners, *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), in which double jeopardy was neither briefed, argued, nor decided. Although he considered the claim deserving of "very serious consideration," the trial judge erroneously assumed that he was precluded from deciding it "in the first instance" (Appendix 49) because the Third Circuit, after reversing the first trial for an erroneous evidentiary ruling, had remanded for a new trial. To be sure, that opinion contained "certain rather explicit suggestions and instructions" (Appendix 44) for the anticipated retrial—suggestions prompted by the host of errors and near-errors committed at the first trial, *Starks, supra*, 515 F.2d at 118, 123-24, 125. It should not have been construed, however, to support the extraordinary proposition that, irrespective of any motions, change in circumstance or additional errors, a second trial was unconditionally mandated.

The short of the matter is that petitioners never had a chance to have the district court consider the motion

on its merits. The trial judge, in taking the Circuit Court's *pro forma* order of a new trial (in essence a ruling that the original trial was tainted by error) as a ruling upon the double jeopardy claim never before the appellate court, clearly abdicated his *nisi prius* jurisdiction to decide the issue. Such an abdication is subject to review by mandamus. *Roche v. Evaporated Milk Association*, 319 U.S. 21, 31 (1943); *See Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955). Thus the Third Circuit appropriately decided the case, irrespective of whether its decision had the practical effect of affirming the refusal below to pass on the merits.

Secondly, and no less importantly, we rely on the principle, dating back to *Rex v. Barker*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824 (k.B. 1762), that mandamus lies where there is no other adequate means of correcting "a failure of justice." *See Ex parte Peru*, 318 U.S. 578. 586-87 (1943); *Donnelly v. Parker*, 486 F.2d 402, 408 (D.C. Cir. 1973); *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970). Surely, the harrassment of a second, illegal *criminal* trial is no less unjust than the burden of being required to undergo a civil trial improperly referred to a master, *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957), a civil trial improperly transferred to another district, *Hoffman v. Blaski*, 363 U.S. 335, 340-41n.9 (1960), or a civil trial in contravention of the right to a jury, *Beacon Theatres v. Westover*, 359 U.S. 500, 511 (1959); *Ex parte Peterson*, 253 U.S. 300, 305-06 (1920); *Ex parte Simons*, 247 U.S. 231, 239-40 (1918).[5] As we have indicated above, it is the vital function of the double jeopardy clause of the Constitution to save the defendant from being impermissibly forced to run the gauntlet of prosecution a second time. A victory for petitioners on final judgment, should relief be denied here, would indeed

"be a barren one." *Hartly Pen Co. v. United States District Court,* 287 F.2d 324, 330 (9th Cir. 1961).

It remains only to point out that, if this Court deems mandamus rather than appeal the appropriate remedy in the instant case, no useful purpose would be served by dismissing the writ of certiorari and inviting petitioners to proceed anew by filing an application for mandamus in the Court of Appeals. That court has already addressed the merits of the double jeopardy claim. This Court has granted certiorari and the merits have been fully briefed. The matter is accordingly ripe for review now.

C. The Sufficiency of Petitioners' Indictment is Properly Before This Court.

One this Court has assumed jurisdiction of petitioners' double jeopardy claim (whether on the "appellate" or "mandamus" theory), it should also consider the sufficiency of petitioners' indictment. The court below properly exercised its jurisdiction by addressing this claim on the merits.

A federal appellate court which has jurisidction of an appeal on one question involved in a case, here the double jeopardy question, need not confine itself to the original order appealed; "If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated." *Deckert v. Independence Shares Corporation,* 311 U.S. 282, 287 (1940) (and cases cited therein), *quoting Meccano, Ltd. v. John Wanamaker, N.Y.,* 253 U.S. 136, 141 (1920). Since petitioners' bill of indictment is insufficient, there is such an "insuperable objection: requiring its dismissal. And in *Schlagenhauf v. Holder,* 379 U.S. 104, 111 (1964), a question not suitable for mandamus when considered by itself was considered by this Court along

with a question that was appropriate, because such consideration promoted the efficient litigation of that case. In *Schlagenhauf,* answering the "pendent" question might have speeded the litigation, but could not formally end it; thus the justification for considering petitioners' claim on their indictment is even stronger than required by precedent.

The question of the sufficiency of petitioners' indictment may be considered now even though, standing alone, it could not be addressed until after conviction. *Chicago, Rock Island & Pacific R. Co. v. Stude,* 346 U.S. 574, 578 (1954); *Schlagenhauf v. Holder, supra.* In *Stude,* an original action in a federal district court and an action removed from a state court had been treated together by both the litigants and the district court. The district court dismissed the original action but refused to remand the removed action to the state court. This court allowed appeal of the refusal to remand because it

> may be considered as assigned in a case involving an appealable order, the order dismissing the [original] complaint and the action. This is true despite the fact that the order denying the motion to remand standing alone would not be appealable.

Id. at 578, citing *Deckert v. Independence Shares Corporation, supra. See United States v. MacDonald,* 531 F.2d 196, 199 (4th Cir.), *petition for cert. filed* (June 29, 1976) (No. 75-1892) 43 U.S.L.W. 3005. (case dismissed on speedy trial ground, not independently appealable before trial, when "pendent" to double jeopardy plea).[13]

Note that in *Stude,* the consideration of the motion to remand could take the case out of federal court, but could not terminate the litigation altogether. Holding petitioners' indictment insufficient will end the litigation against them; thus efficiency requires examining

petitioners' claim now even more clearly than it required examining the claim in *Stude. See Schlagenhauf v. Holder, supra.*

The policy against piecemeal appeals ordinarily suggests that an appellate court wait for completion of all litigation below before considering questions; here, by contrast, it requires consideration of petitioners' indictment pendent to an appealable question. Consideration of the indictment does not slow up this litigation now, for the double jeopardy claim is on appeal; but refusal to consider it virtually assures that if petitioners are convicted an appeal will follow. This consideration has led three Justices to suggest that in some circumstances "pendent" appeals should be considered mandatory, not merely acceptable. "Otherwise wasteful litigation is invited, and the losing party on the merits is given another bite at the apple." *Alligator Co. v. La Chemise Lacoste*, 421 U.S. 937, 938-39 (1975) (White, Blackmun, and Powell, JJ., dissenting from denial of certiorari).

It is no objection to jurisdiction here that petitioners challenged the sufficiency of the indictment for the first time in the Court of Appeals. Federal Rule of Criminal Procedure 12(b)(2) allows claims that an indictment fails to state an offense to be raised at any time during the proceeding. This has consistently been held to allow the question to be raised for the first time on appeal. *E.g. United States v. Seuss*, 474 F.2d 385 (1st Cir.), *cert. denied*, 412 U.S. 928 (1973); *United States v. Beard*, 414 F.2d 1014 (3d Cir. 1969).

Finally, failure to raise the question in the trial court has nothing to do with the issue of this Court's jurisdiction. The case is properly in this Court and, as emphasized above, disposition of the merits of both issues presented will expedite the entire case.[4]

IV.

CONCLUSION

The Court of Appeals for the Third Circuit properly exercised its power of appellate review when it took jurisdiction of petitioners' claims that the Double Jeopardy Clause and the insufficiency of the indictment bar their re-trial. This Court should therefore now decide petitioners' claims, and reverse the decision below on the merits.

Respectfully submitted,

RALPH DAVID SAMUEL

THOMAS C. CARROLL

JOEL HARVEY SLOMSKY

FOOTNOTES

[1] The leading Third Circuit case is *United States v. DiSilvio*, 520 F.2d 247 (3d Cir.), *cert. denied*, 423 U.S. 1015 (1975).

The first case to allow such an appeal was *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972). *Accord, United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975); *United States v. Alessi*, No. 76-1189 (2d Cir. July 7, 1976), *petition for cert. filed*, 45 U.S.L.W. 3133 (Aug. 6, 1976), (No. 76-176) (dubitante); *United States v. Barket*, 530 F.2d 181 (8th Cir. 1975), *cert. denied*, (November 1, 1976), (No. 75-1280). *Cf. Thomas v. Beasly*, 491 F.2d 507 (6th Cir.), *cert. denied*, 417 U.S. 955 (1974) (petitioner allowed to invoke federal *Habeas* before retrial, claiming double jeopardy, because he had exhausted all state remedies to protect his right not to be twice jeopardized).

[2] *United States v. Bailey*, 512 F.2d 833 (5th Cir.), *cert dismissed*, 423 U.S. 1039 (1975); *United States v. Young*, No. 75-3102 (9th Cir. October 19, 1976).

Cf. United States v. Bartemio, No. 76-1039 (7th Cir. April 5, 1976), *petition for cert. filed*, No. 75-6657 (dismissing double jeopardy appeal without opinion) (as cited in Government brief).

[3] The same basic principles of finality govern both 28 U.S.C. §§1291 ("final decisions" of U.S. District Courts appealable) & 1257 ("final judgments or decrees" of highest state courts reviewable by U.S. Supreme Court). *See Local No. 438, Construction Laborers Union v. Curry*, 371 U.S. 542, 549 (1963), sustaining review under §1257 for precisely the same reasons earlier stated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (construing §1291).

[4] *Harris, Colombo,* and *Turner* do not by name overrule *Rankin v. The State*, 78 U.S. (11 Wall.) 389 (Dec. 1870 term) (plea of double jeopardy denied in state system not reviewable by Supreme Court before second trial). All four cases, however, can be reconciled. In 1870, the double jeopardy clause had not been applied to the states. Thus a citizen had no recognized *federal* right not to be tried a second time in the state courts, and his right not to be deprived of life, liberty or property without due process of law could be protected by review after conviction. Now the citizen has the right not to be twice jeopardized in state court. Cases cited in text immediately *infra*

define the double jeopardy right and *Benton v. Maryland*, 395 U.S. 784 (1969), applies it to the states. Thus the recent cases allow Supreme Court review to protect that right.

The double jeopardy dictum in *Heike v. United States*, 217 U.S. 423, 432-33 (1910) can be similarly explained. To the extent that it says that "the overruling of a plea of former conviction or acquittal has never been held . . . to give a right of review before final judgment [of conviction]." It has clearly been rejected by *Harris, Colombo,* and *Turner.*

[5] Certain rights which citizens must enforce before trial may be protected in ways other than the appeals provision of §1291. For example, where a citizen alleges that a prosecution is brought against him in bad faith, and that his state trial would harrass him in violation of his first and fourteenth amendment rights, his remedy is not appeal through the state system to the Supreme Court (under §1257) before trial, but a separate action under 42 U.S.C. §1983. *Compare, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965), *with Younger v. Harris*, 401 U.S. 37 (1971). Similarly, all questions of federal bail, one type of which was held appealable under §1291 in *Stack v. Boyle*, 342 U.S. 1, 6 (1951), are today reviewed under 18 U.S.C. §3147 (enacted 1966).

Thus the doctrine of appealability under §1291 which petitioners urge is limited even further than Justice Frankfurter's *Cobbledick* opinion requires. Not all motions to protect rights which will be destroyed before post-judgment appeal need be appealable before trial, but only those which, as here, Congress has not provided with another means of protection.

[6] For example, while the facts of *Cobbledick* are similar to those of *Perlman*, Cobbledick, unlike Perlman, could protect himself from giving the evidence by refusing to turn it over and appealing a citation for contempt. Thus this Court properly refused to allow him an interlocutory appeal.

Similarly, in *Heike v. United States*, 217 U.S. 423 (1910), the plaintiff in error had been granted immunity and had been compelled to testify as to certain matters. He was then indicted, he claimed, for a crime of which he could not be convicted because of the immunity. This Court refused jurisdiction of his pretrial appeal. Heike had already testified under compulsion, so that the only violation of his fifth amendment rights which could occur at the time was his conviction and punishment "out of his own mouth." Appeal after conviction was adequate security

against that possibility. (note 2 *supra* explains the double jeopardy dictum in this case.)

In the typical case of a defendant moving to exclude illegally seized evidence or a coerced confession from a trial, appeal will also remain unavailable. *Cogen v. United States*, 278 U.S. 211 (1929) (illegally seized evidence); *DiBella v. United States*, 369 U.S. 121 (1962) (same). A defendant's right to be punished only on the basis of constitutionally obtained evidence can be vindicated on post-conviction appeal. His right not to be coerced, not to have his privacy invaded, cannot be protected by pretrial appeal, for this violation has already occurred.

[7]An example of such a statutory exception is 28 U.S.C. §1292(b), allowing certain interlocutory appeals in civil cases.

[8]"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a) (1970).

[9]*Compare Blay v. Young*, 509 F.2d 650 (6th Cir. 1974) (statute required United States Supreme Court to hear all appeals from the three-judge court, thus available to Circuit court as "in aid" of that court's jurisdiction).

[10]*Accord, Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, 440 F.2d 765, 769 (2d Cir. 1971) (Friendly, J.); *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972) (*per curiam*); *Hackett v. General Host Corp.*, 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *International Nickle Co. v. Martin J. Barry, Inc.*, 204 F.2d 583, 585 (4th Cir. 1953); *United States v. Briggs*, 514 F.2d 794, 808 (5th Cir. 1975); *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777, 779 (9th Cir. 1950); *Flora Construction Co. v. Fireman's Fund Insurance Co.*, 307 F.2d 413 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); *see generally* 9 J. MOORE, FEDERAL PRACTICE ¶ 110.26 at 316 & n.73 (2d ed. 1975).

[11]It is true that there is a difference in form between the mandamus and appeal procedures, in that the former is usually brought against the judge who issued the challenged order. That can hardly be deemed a difference in substance. This Court's discomfort with the mandamus procedure, expressed in *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-85 (1953), to the effect that the district judge ought not lightly be made a litigant has been mooted by the Third Circuit in *Rapp v. Van Dusen*, 350 F.2d 806, 810-13 (3d Cir. 1965); *Texaco Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967) and by Fed. R. App. P. 21(b). The current practice is to make the district judge but a nominal respondent, with no obligation to take part in the proceedings. *See General Tire & Rubber Co. v. Watkins*, 363 F.2d 87, 89 (4th Cir.), *cert. denied*, 385 U.S. 899 (1966); *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 442 (2d Cir. 1966); 9 *J. Moore, Federal Practice* ¶ 221.03 at 3405 (2d ed. 1975). An apt analogue to the present case is the common situation in which this Court treats an improperly filed appeal as a petition for a writ of *certiorari*.

[12]*See generally*, Note, *Mandamus Proceedings In The Federal Courts of Appeals: A Compromise With Finality*, 52 *Cal. L. Rev.* 1036, 1046-47 (1964). The Government in this case acknowledges mandamus to be a proper remedy, specifically endorsing its use where a district court has "refused to exercise the authority with which it is endowed" or where the trial judge rejects "seemingly meritorious double jeopardy claims without giving them serious consideration." Brief for the United States at 54, 55. The Government has described precisely the facts of this case, as we point out, *supra*.

[13]In *MacDonald* the court stated that the speedy trial claim was considered because of the "extraordinary" nature of the case. In *United States v. Barket*, 530 F.2d 181, 186 (8th Cir. 1975), *cert. denied*, (November 1, 1976), (No. 75-1280), the court of appeals refused to consider a claim that the indictment of appellant was insufficient or that he was charged under an unconstitutional statute. The court did not hold itself without power to consider the claim if it had felt that justice would have been speeded thereby. The *Barket* court may well have concluded that the constitutional question would turn upon the particular application of the statute to the facts of Barket's case, which would only become clear through trial testimony. *See* note 7 *infra*. These cases indicate at most that a court of appeals has discretion not to consider "pendent" appellate claims. *Cf. United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (district judge has discretion whether or not to consider state claims pendent to federal claims). Because of the efficiency in considering the sufficiency of petitioners' indictment now, the court below exercised its discretion wisely in agreeing to consider it, and it is properly before this Court.

[14]Obviously, the class of questions which can be brought up for review in this manner should be limited to those that can be intelligently decided on the record before the appellate court. Here the record is complete – the indictment either does or does not state a federal offense in proper form and the court below has already registered its opinion on the question.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

BRIEF FOR ALEXANDER J. BARKET AS AMICUS CURIAE

VERYL L. RIDDLE
THOMAS C. WALSH
ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102
Attorneys for *Amicus Curiae*

BRYAN, CAVE, McPHEETERS & McROBERTS
LEVY & CRAIG
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Cases Cited

Miscellaneous Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

BRIEF FOR ALEXANDER J. BARKET AS AMICUS CURIAE

This brief is being filed on behalf of Alexander J. Barket as *amicus curiae* with the consent of all parties. Pursuant to Rule 42, the written consents of counsel for each party have been lodged with the Clerk.

QUESTION PRESENTED

The government in its Memorandum in response to the Petition for Certiorari raised a question not posed by petitioners:

whether a pre-trial order refusing to dismiss an indictment on double jeopardy grounds is an appealable order. This brief is limited to a discussion of that question.

INTEREST OF THE AMICUS CURIAE

Alexander J. Barket, *amicus* herein, is the petitioner in No. 75-1280. Because of the important jurisdictional question presented in the instant case and in *Barket*, the United States acquiesced in the Petition for Certiorari in both cases. Alternatively, the government suggested that the Court might wish to grant in *Abney* and to defer consideration of *Barket* until final resolution of *Abney*. The Court has apparently adopted the later course inasmuch as the petition in *Barket* has not been acted upon.

Amicus was tried before a federal district judge, without a jury, on one count of a two-count indictment arising out of a single incident. In the count which was tried, he was alleged to have misapplied bank funds under 18 U.S.C. § 656 "for the purpose of making an unlawful political contribution." He was acquitted of that charge, and the trial judge specifically found, *inter alia*, that there was a "failure of proof on the part of the government that the purpose of the defendant's action was the making of an illegal political contribution."

Following that acquittal, the government sought to try *amicus* on the remaining count of the indictment, which charged him with consenting to an illegal political contribution under 18 U.S.C. § 610. The incident forming the nucleus of the remaining count was exactly the same transaction upon which the earlier charge had been based, and the government has stipulated that it intends to use precisely, in all respects, the same evidence at the trial of the § 610 charge that was offered at the previous trial.

Amicus moved to dismiss the remaining count of the indictment on the grounds, *inter alia*, of double jeopardy and collateral estoppel.[1] That motion was denied by the district court, and *amicus* appealed to the Eighth Circuit. The Court of Appeals held that it had jurisdiction of the appeal but ruled against *amicus* on the merits of his fifth amendment claim. *United States v. Barket*, 530 F. 2d 181 (8th Cir., Dec. 9, 1975). It is that ruling which is being challenged in No. 75-1280.

The key jurisdictional issue raised by the government in its Memorandum in the instant case is identical to that in No. 75-1280, and the disposition of *amicus*' Petition will be vitally affected by the ruling in the instant case.

---

[1] The prosecutor had previously conceded on at least two occasions that an acquittal on the § 656 charge would bar trial of the § 610 count under the principles of *Ashe v. Swenson*, 397 U.S. 436 (1970).

ARGUMENT

An Order Overruling a Plea of Double Jeopardy Is Appealable as a "Final" Order Under 28 U.S.C. § 1291

A. The Concept of "Finality."

The threshold question in this case is one that has troubled this Court and others on many occasions, *i.e.*: when is a decision "final" and hence appealable under 28 U.S.C. § 1291?[2] The finality requirement has deep roots which can be traced back to the Judiciary Act of 1789.[3] It reflects a well-considered policy "against piecemeal reviews and against obstructing and impeding an ongoing judicial proceeding by interlocutory appeals." *United States v. Nixon*, 418 U.S. 683, 690 (1974). Nevertheless, this Court has repeatedly emphasized that § 1291 does not restrict appellate review only to those judgments which finally terminate a lawsuit but, rather, that the concept of finality must be given a "practical rather than a technical construction." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974); *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); *Swift & Co. v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

The determination of finality *vel non* in a specific context is frequently a challenging one, and the guidance afforded by precedent is often only dimly perceptible and occasionally dis-

---

[2] Section 1291 provides:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

[3] Sections 21, 22 and 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85.

cordant. Essentially the process requires a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *Eisen v. Carlisle & Jacquelin*, *supra* at 171.

Significantly, § 1291 does not speak in terms of "final judgments" but rather of "final decisions."[4] Congress contemplated that a given ruling could be final for all practical purposes even though the case itself had not been concluded. The landmark decision in *Cohen v. Beneficial Industrial Loan Corporation*, *supra*, accordingly recognized a "small class" of orders which should be considered "final" if they have three characteristics: (1) they must finally determine claims of right "separable from and collateral to" rights asserted in the action; (2) the right must be too important to be denied review; and (3) review cannot await final judgment because by that time the claimed right will have been lost, probably irreparably. See 9 MOORE, FED. PRAC. ¶ 110.10. In *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964), *Cohen* was interpreted to mean that a collateral order should be deemed "final" if it was "fundamental to the further conduct of the case."[5]

The *Cohen-Gillespie* rationale has also been applied in criminal cases where the right being asserted would be frustrated or mooted in the absence of prompt review. Almost 60 years ago in *Perlman v. United States*, 247 U.S. 7 (1918), the Court permitted an appeal from an order requiring the compulsory production of documents before a grand jury. Discussing *Perlman*

---

[4] Compare § 1257, which governs review by this Court of "final judgments or decrees rendered by the highest court of a state in which a decision could be had."

[5] To the same effect is the statement in *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940), that the absolute requirement of finality should be departed from "when observance of it would practically defeat the right to any review at all."

in his opinion for the Court in *Cobbledick*, 309 U.S. at 328-29, Mr. Justice Frankfurter noted the underlying basis for the ruling:

> "To have held otherwise would have rendered Perlman 'powerless to avert the mischief of the order . . .' 247 U.S. at 13. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. *To have denied him the opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.*"[6]

In *Stack v. Boyle*, 342 U.S. 1 (1951), the Court employed the *Cohen* analysis and determined that an order denying a motion to reduce bail was "final" under §1291 even though the underlying action was obviously far from concluded. The decision in *Mills v. Alabama*, 384 U.S. 214 (1966), is also instructive, although it dealt with "finality" under §1257. There it was held, *l.c.* 219, that an order overruling a demurrer to a criminal complaint was "final" where the charge was based upon an "obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." Prompt review of a clear-cut constitutional violation and prevention of an illegal trial were deemed necessary to obviate "a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." Such considerations are uniquely apposite to the present context.

---

[6] Emphasis ours here and throughout this brief except where otherwise indicated.

Most recently, in *United States v. Nixon*, 418 U.S. 683 (1974), the Court ruled that the denial of a motion to quash a third-party subpoena issued to the President of the United States in connection with a criminal investigation was "final" because "denial of immediate review would render impossible any review whatsoever of an individual's claims," citing *United States v. Ryan*, 402 U.S. 530, 533 (1971).

The foregoing criminal cases recognizing the "finality" of certain orders should be compared with such decisions as *United States v. Ryan*, 402 U.S. 530 (1971); *DiBella v. United States*, 369 U.S. 121 (1962); *Carroll v. United States*, 354 U.S. 394 (1957); *Parr v. United States*, 351 U.S. 513 (1956); and *Cobbledick v. United States*, *supra*. When all these cases are sifted and weighed, it becomes apparent that the *ratio decidendi* of any "finality" determination is whether the right being asserted will be seriously and irreparably damaged if immediate review is not had. The finality rule should not be applied in such a manner as to render appellate review an empty ritual.

B. **The Nature of Double Jeopardy.**

The Fifth Amendment provides in relevant part that:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The constitutional protection against double jeopardy derives from the English common law and is designed to insulate an accused against repetitive or successive prosecutions for the same alleged crime. *United States v. Wilson*, 420 U.S. 332 (1975). The prohibition not only applies to a second punishment but also forbids a second trial, whether the accused was acquitted or convicted at the first trial. *United States v. Ball*, 163 U.S. 662 (1896). In *Green v. United States*, 355 U.S. 184, 187-88 (1957), Mr. Justice Black noted the genesis and the intendment of the double jeopardy clause:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, *thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*"[7]

The double jeopardy clause decrees that once a man has been tried for a given crime, there can be no second trial on that charge. He is constitutionally entitled to be spared the ordeal, stress and "heavy personal strain" which necessarily inhere in the defense of any criminal prosecution. *Breed v. Jones*, 421 U.S. 519 (1975). The double jeopardy right, then, is *sui generis*—it is different in kind, rather than in degree, from other constitutional entitlements because it proscribes the trial itself. Yet, in the instant case as well as in *Barket*, the government has vigorously sought to block prompt appeal of the double jeopardy question by the superficial assertion that opening a crack for immediate resolution of double jeopardy questions will encourage a flood of interlocutory appeals raising other constitutional issues. That simply is not so because of the distinctive nature of double jeopardy. No other constitutional safeguard stands on the same footing or serves the same purpose. In *Robinson v. Neil*, 409 U.S. 505, 509 (1973), the Court said:

"The guaranty against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guaranty, like the others, is a constitutional right of the criminal defendant, *its practical result is to prevent a trial from taking place at all*, rather than to proscribe procedural rules that govern the conduct of a trial."

---

[7] See also *United States v. Jorn*, 400 U.S. 470, 479 (1971).

The government's "parade of horribles," forecasting a flood of interlocutory appeals, rests on a faulty foundation and is without basis in law or in fact.

C. The Finality Rule as Applied to Double Jeopardy.

Because of the foregoing considerations, it is scarcely surprising that five of the six Circuits which have considered the jurisdictional question posed by this case have applied a "practical rather than a technical construction," as required by *Cohen* and *Eisen*, and have properly concluded that an order denying a double jeopardy motion is "final" and therefore appealable under § 1291.[8]

The seminal opinion of the Fourth Circuit in *United States v. Lansdown*, 460 F. 2d 164, 171 (4th Cir. 1972), observed that a double jeopardy appeal fits squarely within the tripartite test of *Cohen* because:

"First, defendant's right is under the fifth amendment and it is separable from, and collateral to, the main cause

---

[8] Cases so holding include:

Second Circuit: *United States v. Beckerman*, 516 F. 2d 905 (2d Cir. 1975).

Third Circuit: *United States v. Starks*, — F. 2d — (3d Cir. 1976); *United States v. DiSilvio*, 520 F. 2d 247 (3d Cir. 1975), *cert. denied*, — U.S. — (1975); *United States ex rel. Stewart v. Hewitt*, 517 F. 2d 993 (3d Cir. 1975); *United States ex rel. Webb v. Court of Common Pleas*, 516 F. 2d 1034 (3d Cir. 1975); *United States ex rel. Russo v. Superior Court*, 483 F. 2d 7 (3d Cir. 1973), *cert. denied*, 414 U.S. 1023 (1973).

Fourth Circuit: *United States v. MacDonald*, 531 F. 2d 196 (4th Cir. 1976); *United States v. Lansdown*, 460 F. 2d 164 (4th Cir. 1972).

Sixth Circuit: *Thomas v. Beasley*, 491 F. 2d 507 (6th Cir. 1974), *cert. denied*, 417 U.S. 955 (1974).

Eighth Circuit: *United States v. Barket*, 530 F. 2d 181 (8th Cir. 1975).

Contra, Fifth Circuit: *United States v. Bailey*, 512 F. 2d 833 (5th Cir. 1975); *Gilmore v. United States*, 264 F. 2d 44 (5th Cir. 1959).

of action which is whether he is innocent or guilty of the crimes charged. Second, the right claimed is a constitutional one and, as such, it is too important to be denied review. Finally, if review is not had now, the right claimed—to be free from being twice forced to stand trial for the same offense—will be irreparably lost."

The lone dissenting view on this subject has been voiced by the Fifth Circuit. In *United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975), that court held, as the government has urged in all of these cases, that the right to be free from a second trial can be effectively vindicated by a reversal of any conviction which might be obtained. Such a view misconceives the nature of the double jeopardy protection and seriously underestimates the "heavy personal strain" which is a necessary concomitant of any criminal prosecution.[9]

The Fourth Circuit's rejection of this reasoning in *Lansdown*, *l.c.* 171, is hard to improve on:

---

[9] *Amicus'* own case is a graphic example of the abuses which the double jeopardy clause was designed to prevent. *Amicus* has been subjected to four charges in connection with the United States Attorney's investigation of so-called "political corruption" in the State of Missouri. An earlier case was dismissed by the district judge for prosecutorial misconduct and pre-indictment delay, and that dismissal was upheld by the Eighth Circuit. *United States v. Barket*, 530 F. 2d 189 (8th Cir. 1976). The evidence in that case showed that the United States Attorney used the indictment process as a pressure tool to extract information from defendant and repeatedly leaked grand jury data to the news media. His methods were also criticized by the Court of Appeals in another case arising out of the same investigation. *United States v. Lasater*, — F. 2d — (8th Cir. 1976).

As in the previous case, the U.S. Attorney pyramided the charges against *amicus* in order to maximize the pressure. *Amicus* was forced to endure the ordeal of one trial after the government had "elected" to try the § 656 charge against him. All counsel acknowledged that the "election" was final and precluded any further prosecution in the case of acquittal. Yet now the United States Attorney seeks to subject *amicus* to the strain of still another trial using the same evidence, merely by changing the name of the crime. Such tactics cry out for meaningful enforcement of the double jeopardy clause.

"This argument is based upon a lack of appreciation of the true nature of the objectives of the guarantee against double jeopardy. *The double jeopardy 'prohibition is not against being twice punished, but against being twice put in jeopardy.'* . . . Indeed, the Supreme Court has stated that the 'underlying idea' of the double jeopardy clause is that the 'State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to *embarrassment, expense* and *ordeal* and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' . . . Even if an appellate court reverses the conviction in a second trial on the grounds of double jeopardy, a defendant has still not been afforded the full protection of the fifth amendment since he has been subjected to the embarrassment, expense, anxiety and insecurity involved in the second trial. *If an individual is to be provided the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial.*"

This Court, too, has twice recently recognized the finality of pre-trial double jeopardy determinations and has reviewed them on the merits. In *Harris v. Washington*, 404 U.S. 55 (1971), the Court summarily reversed an order of the Washington Supreme Court authorizing a retrial of the petitioner following his acquittal in the first trial. An essential element of the second prosecution had been resolved adversely to the State in the first case, and hence a retrial was forbidden by the collateral estoppel doctrine articulated in *Ashe v. Swenson*, *supra*. As for the finality of the order denying the petitioner's motion, the Court stated, *l.c.* 56:

"Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the peti-

tioner, a claim separate and apart from the question of whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. §1257." (Emphasis by the Court.)[10]

In *Turner v. Arkansas*, 407 U.S. 366 (1972), the Court, in another summary *per curiam* opinion, reversed the judgment of the Arkansas Supreme Court permitting the petitioner to be retried for robbery after he had already been acquitted of murder in connection with the robbery. The petition was considered on the merits, and the case was adjudged to be "squarely controlled by *Ashe v. Swenson*."[11]

Harris and *Turner* correctly determined that the denial of a double jeopardy motion is a "final" order for the obvious reason that an erroneous rejection of a double jeopardy plea by the trial court, which authorizes the retrial, cannot be cured by a post-trial appeal. By any standard, then, the order of the district court in the instant case was final and the Court of Appeals had jurisdiction to entertain the petitioners' double jeopardy claim.

---

[10] To the extent that *Rankin v. State*, 11 Wall. 380 (1870) is to the contrary, it has been at least implicitly overruled by such intervening decisions as *Cohen*, *Harris* and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

[11] The *Turner* case is virtually identical to *Barket* because in both cases the prosecution stipulated that it intended to use the very same evidence in the second trial.

CONCLUSION

Although the prohibition against piecemeal review of criminal cases is well founded, the fifth amendment's concern about successive and repetitive prosecutions weighs heavier on the *Dickinson* scales of justice. A criminal defendant who has once been forced down the "gauntlet" must be permitted to challenge the propriety of a second ordeal before being forced to endure it. Once the second trial begins, his constitutional rights have been irretrievably and "finally" lost.

Respectfully submitted,

VERYL L. RIDDLE

THOMAS C. WALSH

ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102
Attorneys for *Amicus Curiae*

BRYAN, CAVE, McPHEETERS &
McROBERTS
LEVY & CRAIG
Of Counsel

July, 1976